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Supreme Court, U.S.
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No. 09-357 SEP 23 2009

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In The

Supreme Court of the United States

BRENT SMITH,

Petitioner,

v.

KURT JONES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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September 23, 2009

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QUESTIONS PRESENTED

I. Where a State Court has reviewed the merits of a petitioner's federal claim for plain error, is the decision of the Sixth Circuit in a habeas corpus action that there was procedural default of that claim contrary to the decisions of this Court.

II. Whether the decision of the Sixth Circuit conflicts with the decisions of other circuits that hold a state court's plain-error review of a federal claim is not a procedural default.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b) of the Rules of this Court, there are no other parties to this proceeding whose names do not appear on the caption.

Petitioner Brent Smith was a state court prisoner, the petitioner in the district court and the appellee in the Sixth Circuit.

Respondent Kurt Jones was the warden holding Mr. Smith, the respondent in the district court, and the appellant in the Sixth Circuit.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Brent Smith, respectfully petitions for a writ of certiorari to review the judgment of the Sixth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Sixth Circuit Opinion (App. 1a-26a) is unreported and the denial of rehearing (App. 65a-66a) is unreported. The District Court's Opinion (App. 27a-62a) is unreported. The Michigan Court of Appeals Opinion (App. 67a-99a) is unreported. The Michigan Supreme Court order denying leave (App. 100a-101a) is reported at 471 Mich. 870, 685 N.W.2d 672 (2004).

JURISDICTION

Jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254(1). The judgment of the Sixth Circuit was entered on April 10, 2009, and an order denying a timely motion for rehearing en banc was entered on June 26, 2009 (App. 1a). Jurisdiction in the Sixth Circuit was invoked pursuant to 28 U.S.C. §2253.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §2254(a) provides: "The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

28 U.S.C. §2254(b)(1)(A) provides: "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that – (A) the applicant has exhausted the remedies available in the courts of the State; * * * ."

28 U.S.C. §2254(d) provides that "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

STATEMENT OF THE CASE

The Petitioner sought habeas corpus relief from his Michigan convictions of criminal sexual conduct and his prison sentences of four to fifteen years by filing a petition pursuant to 28 U.S.C. § 2254(a) in the Eastern District of Michigan. App. 27a-28a. On September 25, 2007, the district court judge granted the petition, and ordered that the State take action to afford the Petitioner a new trial within ninety days of the court's order, or that the Petitioner be released. App. 27a-64a.

The Respondent appealed the decision of the district court to the Sixth Circuit Court of Appeals,

and on April 10, 2009, the Sixth Circuit reversed the granting of the writ and remanded this case to the district court for consideration of issues not addressed by the district court in its opinion and order of September 25, 2007. App. 1a-26a. The Sixth Circuit subsequently denied a motion for rehearing en banc on June 26, 2009. App. 65a.

The facts underlying this case were adequately stated by the district court:

> Smith's convictions arise from an incident occurring in the early hours of December 23, 2000, in the City of Berkley, Michigan. During a routine patrol of the rear of the Berkley Front Bar, Smith, a Berkley police officer, investigated two allegedly intoxicated minors, Shannon Sargent and Peter Marinelli, in a parked car. Sargent, who admitted that she was intoxicated and an under-age drinker, claimed that Smith improperly searched her underneath her clothes in the back of his scout car, touching intimate areas of her body. Smith denied searching Sargent improperly at any time.
>
> * * * *
>
> Sargent, the complainant in this case, testified that there was not one search, but rather, there were two searches. She testified that she did not object to the first search; rather, it was the second search, where Smith went under her clothing and touched intimate areas, that was objectionable, though she consented at the time.

* * * *

Regarding the second search, Sargent testified that Smith said, "I hate doing this. Do you want a woman cop?" Sargent said that she didn't know whether she wanted a female officer to conduct the search, rather, she testified that she just wanted to get it over.

* * * *

According to Sargent's testimony, she never refused Officer Smith permission to search under her clothing. No one else who was present at the Berkley Front Bar witnessed the second search.

* * * *

Before the trial commenced, the trial court ruled, over objections by defense counsel, that the prosecution could also present two other female witnesses, Corrine Steinbrenner and Kristin Oliver, as similar acts witnesses.

* * * *

Oliver became aware of this case because of its publicity. She testified that once she became aware, she then filed a federal lawsuit against the Berkley police department and Smith.

* * * *

When Smith was questioned about the alleged incident with Oliver, he confirmed that he had

arrested her, after she made an illegal turn, and ran a red light. He testified that she blew .12 on the PBT. Smith also confirmed that he searched her when he placed her in the holding cell, but he said that he searched her the same way he had searched her on the road, and that the search was in the presence of other officers. Smith denied any improper search of Oliver's intimate areas. He also testified that there were videotapes of the area where the search was conducted, which were kept for several months, but were no longer available.

* * * *

Steinbrenner * * * testified that in June 1998, at about 3:00 a.m., she was driving her friend's car when she was stopped by Smith for failing to stop at a stop sign and failing to use her turn signal. Steinbrenner was sixteen years old at the time, and she did not have a driver's license. However, when stopped and asked by Smith if she had a driver's license, Steinbrenner lied and said that she had a license, but that it was at her house. Smith arrested her for driving without a license.

According to Steinbrenner's testimony, Smith searched her over her clothing outside her car at the scene of the arrest. * * * * It was Steinbrenner's testimony that Smith searched her a second time, groping her breast for about five seconds during the search. * * * * During cross examination, Steinbrenner admitted to making inconsistent statements as to how many

times Smith grabbed her breasts or when he grabbed her breasts.

* * * *

Smith admitted that he arrested Steinbrenner after she ran a stop sign and turned without signaling. He said that he took her to the patrol car and searched her, but said that he never cupped or grabbed her breasts.

* * * *

During the prosecution's closing argument, and during rebuttal, the prosecutor asked the jury to rely on the testimonies of the "similar-acts" witnesses to determine that Petitioner had the propensity to commit the offenses as charged. The prosecutor stated, "He's done it before. He started off with Kristin." [citation to the record omitted] The prosecutor argued that if Kristin Oliver had complained at the time of her arrest, then Sargent would not have had to go through this trial.

The prosecutor also claimed that * * * the whole Berkley police department, wished they had done something more when the Steinbrenner complaint was filed against Smith, "after three girls were now attacked by Petitioner." [citation to record omitted] She argued that Sargent "hit the lottery" when she accused Petitioner, that Sargent should play the lottery because she picked a defendant who had three complaints in two and one half year, and Sargent "just

happened to pick the right guy." [citation to record omitted]

The prosecutor also emphasized the fact that there were no other complaints against other Berkley officers. She told the jury that they should vote not guilty only if they did not believe all three women. The prosecutor reminded the jury of Steinbrenner's statement that the "pervert," Smith, should be taken off the road. [citation to record omitted] She told the jury to decide in favor of the defendant (Petitioner) only if they would be comfortable with their daughters being stopped at three o'clock in the morning by Smith.

The prosecutor also stated "this is not about going after a person who's not guilty. That would be every prosecutor's worst nightmare." [citation to record omitted] She said that if the complainant had changed her story to say that there had been sexual penetration "we would believe her" and would have charged the crime differently. [citation to record omitted] Although no expert witness had testified at trial, the prosecutor argued to the jury that it is common for victims in sex crimes to repress the most significant thing, in this case digital penetration by Smith. [footnote omitted]

Additionally, during the trial, there was extensive questioning of Sargent and her family as to whether they planned on suing Smith. Sargent and her family admitted to hiring an attorney, but said that the attorney had been contacted for legal advice only, and was not

> hired to file a civil suit against Smith. However, only two days after Smith was sentenced, that same lawyer filed a lawsuit against Smith on behalf of Sargent.
>
> App. 28a-39a.

The district judge found that Smith was entitled to habeas corpus relief because of the prosecutor's misconduct, found that the misconduct was flagrant, and that counsel was ineffective for failing to object to the misconduct. App. 47a-61a. He found that the Michigan Court of Appeals had addressed the merits of Petitioner's prosecutorial misconduct claims, that there was no procedural default of the issue, and that the state court's decisions denying relief to Smith were "contrary to, or an unreasonable application of, clearly established Supreme Court precedent * * *." *See, e.g.*, App. 44a, 47a, 50a and 61a.

The Sixth Circuit reversed the granting of the writ, finding that the state court's plain-error review of the merits of Petitioner's prosecutorial misconduct claims was an acknowledgment of a procedural default, that there was no cause or prejudice to excuse the default, and that the ineffective assistance claim was without merit. App. 14a.

REASONS FOR GRANTING THE PETITION

I. Where a State Court has reviewed the merits of a petitioner's federal claim for plain error, the decision of the Sixth Circuit in a habeas corpus action that there was procedural default of that claim is contrary to the decisions of this Court.

"[I]t is a well-established principle of federalism that a state decision resting on an adequate foundation of state substantive law is immune from review in the federal courts." *Fox Film Corp. v. Muller,* 296 U.S. 207 (1935), quoted in *Wainwright v. Sykes*, 433 U.S. 72, 81 (1977). This Court also has concluded that where a state court refuses to hear a claim of a defendant, based on an adequate and independent state-law *procedural* foundation, then federal review of a state court's decision is also precluded in federal habeas corpus cases challenging the legality of detention of a state prisoner brought pursuant to 28 U.S.C. § 2254. *Wainwright v. Sykes*.

This Petition asks for review of a Sixth Circuit decision where the state court recognized that a defendant had failed to object in the trial court to prosecutorial misconduct, but did not refuse to address the claim of a defendant, and instead extensively reviewed the claim of prosecutorial misconduct for plain error and reversible error, even finding one claim meritorious but not sufficient to warrant reversal. That plain-error review of prosecutorial misconduct by the state court was not a refusal to consider a claim based on state law procedure, and the decision of the Sixth Circuit in this case finding procedural default precluding federal review was contrary to the decisions of this Court.

In *Wainwright v. Sykes* this Court concluded that federal habeas review of a federal question, absent a showing of cause and prejudice, was precluded where the state courts had refused to address the question because of the lack of an objection in the trial court. 483 U.S. at 87. The Court held that, where a habeas petitioner in federal court had been found by the state

court to have waived the issue of the voluntariness of his confession by his failure to object at trial, and the state court had not addressed the merits of that issue, a federal court was precluded from reviewing the issue of voluntariness for the first time pursuant to a habeas corpus petition. 433 U.S. at 90-91. The Court limited its decision to "contentions of federal law *which were not resolved on the merits* in the state proceeding due to respondent's failure to raise them there as required by state procedure." 433 U.S. at 87 (emphasis added).

In *Coleman v. Thompson*, 501 U.S. 722 (1991), this Court held that where a defendant in a state court case had his appeal dismissed because it was filed late, there was no presumption that the court reached the merits of the defendant's case. Rather, the dismissal of an appeal because it was not timely filed was a decision of a state court based on adequate and independent state grounds that foreclosed review of federal issues in the defendant's case.

This Court announced a rule for determining whether there has been a decision on the merits: "If the decision of the last state court to which the petitioner presented his federal claims fairly appeared to rest primarily on resolution of those claims, or to be interwoven with those claims, and did not clearly and expressly rely on an independent and adequate state ground, a federal court may address the petition." 501 U.S. at 735.

In *Mullaney v. Wilbur*, 421 U.S. 684, 688 (1975), this Court found that there was no procedural default of an issue in state court, where the Maine Supreme Court, recognizing that there had been no objection to

a claimed error in the trial court, nonetheless reviewed the claim because it had "constitutional implications."

In *County Court of Ulster v. Allen*, 442 U.S. 140, 146-148, (1979), this Court found that a claim raised the first time after a jury verdict, where the state appellate courts summarily rejected the claim on appeal without explicit reasoning, was nonetheless decided on the merits and there was no procedural default.

In *Harris v. Reed*, 489 U.S. 255 (1989), this Court applied the "plain statement" rule of *Michigan v. Long*, 463 U.S. 1032, 1042 (1983), and required that, for a state court's ruling to be based on an adequate and independent finding of waiver of a federal issue, the state court must make a "plain statement" that its decision was based on a state procedural rule enforcing waiver. In the case before it in *Harris*, this Court found that where a state court noted that a federal issue could have been raised on direct appeal, but was not, and then went on to consider and reject the claim on the merits, the state court decision of the federal issue was a decision on the merits, and not a decision that rested on an adequate and independent grounds of a procedural default.

In *Engle v. Isaac*, 456 U.S. 107 (1982), this Court found that a defendant's failure to make a contemporaneous objection to an error in a self defense instruction at trial, which caused the state court of Ohio to refuse consideration of the error on appeal, was an adequate and independent state finding that precluded federal review of a claimed error in the self defense instruction. But this Court noted in a footnote that *plain error review by the Ohio courts would have*

been considered a review on the merits. 456 U.S at 135, n. 44. Because the State of Ohio permits the appellate courts to "overlook a procedural default if the trial defect constituted plain error. * * *If Ohio had exercised its discretion to consider respondents' claim, then their initial default would no longer block federal review." *Id.* But since the Ohio courts "declined to exercise this discretion to review the type of claim pressed here" procedural default was recognized by this Court. *Id.*

This case presents to the court the issue addressed by the court in *Harris* and in footnote 44 of *Engle v. Isaac* – where a state court recognizes that there was no objection to an error at trial, but goes on to consider the merits of the claim pursuant to a plain-error standard of review, that review should be considered a review on the merits and not a procedural default. A review of the merits is a review of the merits.

In the instant case, trial counsel's failure to object to prosecutorial misconduct did not prevent the Michigan Court of Appeals from extensively reviewing the petitioner's claims of prosecutorial misconduct on appeal. Rather, the court addressed several of the prosecutorial misconduct claims raised by the petitioner in his appeal. App. 80a-83a, 84a-88a.

The Michigan Court of Appeals noted at the outset of its discussion of claims of the prosecutor's misconduct that appellate review of prosecutorial misconduct is to determine "whether the defendant was deprived of a fair and impartial trial." App. 81a. This standard for prosecutorial misconduct is the same standard as the federal standard for considering prosecutorial misconduct. *See, Donnelly v.*

DeChristoforo, 416 U.S. 637, 643 (1974) (prosecutorial misconduct requires relief when it "so infected the trial with unfairness * * * .") Prosecutorial misconduct is a due process violation that warrants relief on habeas corpus if it is so egregious "as to render the trial fundamentally unfair * * * ." *Washington v. Hofbrauer,* 228 F.3d 689, 708 (6th Cir. 2000)

First, the Michigan Court of Appeals addressed the claimed misconduct of the prosecutor as to whether the prosecutor improperly used the similar acts evidence to argue propensity – "a forbidden purpose" of similar acts evidence under Mich R. Evid. 404(b). App. 80a. As to that claimed misconduct, the court concluded that since the trial court gave a proper limiting instruction as to the use of the similar acts evidence, and an instruction that argument of counsel is not evidence, then a review of the issue was not required to prevent a miscarriage of justice. App. 82a. The Michigan court concluded that the failure to object to the remarks was not ineffective assistance of counsel, and unlikely that the verdict was the result of any improper argument. App. 82a-83a.

The court then considered the defendant's claims that the prosecutor's remarks appealing to civic duty, her statements of personal belief of defendant's guilt, her testifying, and her impeachment of defendant with his silence "deprived defendant of a fair trial, due process, and his right to remain silent." App. 84a. As to these claims of prosecutorial misconduct, the court concluded "We find no reversible error." (*Id.*)

The court noted that since the defendant did not object to the remarks challenged, the court's review was for plain error, which included an error that

"seriously affected the fairness . . . of the proceedings." App. 85a.

As to the first claim of prosecutorial misconduct, the court found that a timely objection and resulting instruction could have cured any prejudicial effect, as to the second claimed error, the court found that it was in response to a defense argument, and any prejudicial effect could have been cured by an instruction, as to the third claimed error, the court found that the remarks of the prosecutor were not improper, and as to the fourth claimed error, the court found that the remarks of the prosecutor were an improper appeal to civic duty, but that the prejudicial effect could have been cured by an instruction, and that the jury did not convict based on an improper argument. App. 85a-87a.

As to the fifth claim of prosecutorial misconduct, the court concluded that the trial court's impromptu interruption of the prosecutor's examination of the witness and his instruction to the jury cured any prejudicial effect the witness's answers would have had. App. 87a-88a.

The court then went on to address additional claims of prosecutorial misconduct, finding that they were unobjected to "and would not warrant reversal." App. 88a.

The district judge in this case found that:

> Although the Michigan Court of Appeals acknowledged Petitioner's prosecutorial misconduct claims were not properly preserved for appeal, it nonetheless addressed each act that Petitioner asserted substantiated the

> alleged prosecutorial misconduct on the merits and concluded that Petitioner was not entitled to relief."
>
> App. 46a.

The district judge found that the Michigan Court of Appeals, when it addressed each issue of prosecutorial misconduct and concluded that the claims "were without merit," did not enforce a procedural sanction and therefore there was no procedural default of the issues. App. 47a.

The Sixth Circuit's reversal of the district judge did not include a review of how the Michigan Court of Appeals reviewed the misconduct of the prosecutor, but simply was an application of a Sixth Circuit rule: "Plain error analysis is more properly viewed as a court's right to overlook procedural defects to prevent manifest injustice, but is not equivalent to a review of the merits." App. 6a, quoting from *Lundgren v. Mitchell*, 440 F.3d 754, 765 (6th Cir. 2006))

The Sixth Circuit decision in this case was contrary to *Harris v. Reed*, *Engle v. Isaac*, *Mullaney v. Wilbur*, *County of Ulster v. Allen*, *Wainwright v. Sykes*, and *Coleman v. Thompson*. The common thread in all of those cases is that a *refusal* of a state court to consider the merits of a petitioner's claim recognizes procedural default based on a state rule, but where the court *considers the merits of the claim*, regardless of any procedural default rule, and the consideration is interwoven with the federal claim presented, then the federal court is not precluded from reviewing the claim in a petition for habeas corpus.

II. The decision of the Sixth Circuit conflicts with the decisions of other circuits, and with other decisions of the Sixth Circuit, that hold a state court's plain-error review of a federal claim is not a procedural default.

A. The conflict with other circuits.

The split among the circuit courts, as to whether plain-error review by a state court is to be considered a review on the merits, has been recognized by several circuits. In *Cargle v. Mullin*, 317 F.3d 1196, 1205, n. 7 (10th Cir. 2003), the Tenth Circuit noted the different methods in the circuits for analyzing plain error review in the context of procedural default. The Third Circuit has also observed:

> [I]t is an open question as to whether the invocation of fundamental error, or similar exception, to mitigate the effect of a state waiver rule always will suffice to avoid the structures of *Wainwright v. Sykes* [citation omitted]. The ultimate answer to this quandary can, of course, only be supplied by the Supreme Court.
>
> *Campbell v. Burris*, 515 F.3d 172, 178 (3rd Cir.), *cert. denied sub nom. Campbell v. Phelps*, ___ U.S. ___, 129 S.Ct. 71 (2008)

Many circuit courts have applied a different rule than the Sixth Circuit, holding that if the state court reviews the merits of a federal issue, whether by plain error review or by other review, the issue reviewed is not procedurally defaulted.

In *Roy v. Coxon*, 907 F.2d 385 (2nd Cir. 1990), the Second Circuit held that a state court's plain error review of an issue, where the state court applied a federal standard of due process in the course of that review, was a merits review that precluded a finding of procedural default of the issue raised. *Id.* at 391. The court found that "[w]here, however, the state court has elected to disregard the procedural default and to decide the claim on its merits, the federal court should likewise decide the claim on its merits." *Id.* at 390.

For another Second Circuit case that found a merits review where procedural default had been acknowledged by the state court, *see also, Brown v. Greiner*, 409 F.3d 523, 532-533 (2nd Cir. 2005), *cert. denied, sub nom. Rosen v. Walsh and Brown v. Ercole*, 547 U.S. 1022 (2006), (the district court had erred in finding procedural default where the state court's ruling, although on procedural grounds, was "interwoven" with the state court's rejection of a federal claim).

The Eighth Circuit has also followed the rule that plain error review by a state court is a review on the merits. In *Mack v. Caspari*, 92 F.3d 637, 641 (8th Cir. 1996), *cert. denied*, 520 U.S. 1109 (1997), the court found that a review by the Missouri Court of Appeals for plain error meant that there was no procedural default that blocked review, and that "this court may also review for plain error." In *Sweet v. Delo*, 125 F.3d 1144, 1150 (8th Cir.1997), *cert. denied*, 523 U.S. 1010 (1998), the Eighth Circuit found that a federal court can reach one issue decided on the merits by the state court despite a finding of procedural default, but not those issues the court refused to consider. *See also, James v. Bowersox*, 187 F.3d 866, 869 (8th Cir. 1999),

cert. denied, 528 U.S. 1143 (2000), holding that a federal court could consider issues disposed of in state court pursuant to plain error review.

In *Walker v. Endell*, 850 F.2d 470 (9th Cir. 1987), *cert. denied*, 488 U.S. 926 (1988), the Ninth Circuit has held unambiguously that: "A state appellate court reviewing for plain error reaches the merits of a petitioners claim." *Id.* at 474. The court relied on footnote 44 of *Engle v. Isaac*, discussed above, where this Court recognized that had there been a plain error review by the Ohio Courts, there would have been no procedural default, and relied on this Court's decision in *County Court of Ulster*. The Ninth Circuit found the footnote in *Engle v. Isaac* "a clear statement that plain error review by a state appellate court negates the defendant's procedural default." *Id.*

For another Ninth Circuit case, *see, Huffman v. Ricketts*, 750 F.2d 798 (9th Cir. 1984), relied on by the court in *Walker v. Endell*. In *Huffman*, the Ninth Circuit reviewed a habeas claim of a petitioner who had not made a contemporaneous objection to a jury instruction in an Arizona trial. The Ninth Circuit held that the petitioner's claim was not barred because even though the Arizona Court of Appeals observed that "[n]o objection was made below to the instruction," the state court went on to decide that "no fundamental error" had been committed. *Id.* at 801 and n. 2. The court relied on *County Court of Ulster County*. *Id.* at 474.

The Tenth Circuit, in *Cargle v. Mullin*, uses an analytical approach, where plain error review can be an adequate and independent state ground, or, where a state court denies relief "for a federal claim on plain-

error review because it finds the claim lacks merit under federal law," then a federal court may consider the issue reviewed and there has been no decision on an adequate and independent state ground. 317 F.3d at 1206.

Other circuits have followed a different rule, the rule applied by the Sixth Circuit panel in the instant case: that when a state court conducts a plain-error review of issues presented, there is an application of a procedural rule that prevents federal review of the issue. *Gunter v. Maloney*, 291 F.3d 74, 80 (1st Cir. 2002) (a discretionary review under a miscarriage of justice analysis does not indicate that a state court has waived an independent state procedural rule for affirming the convictions); *Campbell v. Burris, Id.* (3rd Cir.), (plain error review of violations of the federal constitution will not deprive a state court ruling of its "independent" character); *Willis v. Aiken*, 8 F.3d 556, 567, (7th Cir. 1993), *cert. denied sub nom. Willis v. DeBruyn*, 511 U.S. 105 (1994) (review by Indiana courts for "fundamental error," where there has been no objection to the error in the trial court, is an independent finding of procedural default that precludes federal habeas review);[1] *Julius v. Johnson*, 840 F.2d 1533, 1546 (11th Cir.), *cert. denied* 488 U.S. 960 (1988) (existence of plain error rule does not preclude a finding of procedural default, nor does an independent review of the record by a state appellate court).

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[1] The conclusion reached by the Seventh Circuit that review for fundamental error is a recognition of procedural default is the exact opposite of the conclusion reached by the Ninth Circuit in *Huffman v. Ricketts* that a review for fundamental error is a merits review.

B. The conflict within the Sixth Circuit

The district judge in the instant case relied on the Sixth Circuit case of *Manning v. Hoffman*, 269 F.3d 720 (6th Cir. 2001), where the court found that when the Ohio Court of Appeals had found an issue defaulted, but reopened the case to consider the issue of ineffectiveness of appellate counsel, and, in considering the merits of that claim, found that trial counsel was not ineffective, then because the court "addressed the question of whether [the petitioner's] trial counsel rendered ineffective assistance, it is clear that this issue was not disposed of on procedural grounds." 269 F.3d at 724.

In a case decided about two months before the instant case, another panel of the Sixth Circuit in *Fleming v. Metrish*, 556 F.3d 520, 529-533 (6th Cir. 2009) *Pet. for Cert. pending sub nom. Fleming v. Rapelje*, No. 08-10545, reached the exact opposite conclusion as the panel in this case - deciding that plain-error review of a *Mosely*[2] claim by the Michigan Court of Appeals *was* a review on the merits.[3] In *Fleming*, the panel found that the test for determining whether there is a review on the merits or a procedural default of a claim in state court is to examine "the legal reasoning provided by the state court in disposing of a claim . . . not the standard of review through which that claim is viewed." 556 F.3d

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[2] *Michigan v. Mosely*, 423 U.S. 96 (1975)

[3] A petition for rehearing en banc was filed in this case to ask the full Sixth Circuit to reconcile the conflict between the instant case and *Fleming v. Metrish*, but the court denied the petition. App. 65a-66a.

at 531. Judge Clay dissented, believing that the plain-error review by the Michigan courts constituted a finding of procedural default, citing some of the Sixth Circuit precedent relied on by the panel in the instant case. 556 F.3d at 537-544. The Tenth Circuit opinion of *Cargle v. Mullin* was cited by Judge Clay for the proposition that "there is a split among the circuits" as to whether or when plain-error review is a review on the merits. 556 F.3d at 540.

Only this court, by granting this petition, can resolve the split among the circuits as to whether a state court's plain-error review of a federal claim is a review of the merits of that claim that permits review of the claim under 28 U.S.C. § 2254(a).

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be granted.

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APPENDIX

APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 07-2275

[Filed April 10, 2009]

BRENT SMITH,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
KURT JONES, Warden,	)
	)
Respondent-Appellant.	)
	)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

Before: BOGGS, Chief Judge; COLE and COOK, Circuit Judges.

COOK, Circuit Judge. Brent Smith, convicted in Michigan on three counts of criminal sexual conduct, seeks a writ of habeas corpus under 28 U.S.C. § 2254.

The district court granted Smith's petition and we reverse and remand.

I. Background

The Michigan Court of Appeals set forth the pertinent facts:

> Defendant was a police officer with the City of Berkley from June 1997 until approximately 2001. The instant charges arose from events in the early morning hours of December 23, 2000, when defendant, who worked the midnight shift, was on duty and patrolling. The complainant, 19 year-old Shannon Sargent, testified that at around 1:30 a.m. that morning, defendant approached the vehicle in which she and her boyfriend were "making out," which was parked behind a bar in Berkley. Sargent showed defendant a driver's license that was not her own, belonging to a woman who was of legal drinking age. Sargent testified that defendant asked her to step out of the car and get in the police car, asked if he could search her and did so, and later asked if he could do a second search while she was seated in the back seat of the patrol car, during which he felt her breast, inner thighs, vaginal area, and buttocks, while his hand was underneath her clothes. She testified she was crying and hysterical. Her boyfriend at the time, Peter Marinelli, corroborated that testimony, and said she had told him that defendant had put his finger inside her. Defendant drove Marinelli and Sargent to the local Denny's and dropped them off. The manager of Denny's testified that he

> saw Marinelli and Sargent and that Sargent was crying and upset. Sargent's mother and Sargent testified to the adverse effects and mental anguish the incident caused Sargent, including her seeking therapy, her subsequent inability to drive more than short distances and her fear of police officers.

People v. Smith, No. 238005, 2003 Mich. App. LEXIS 2524, at *1–2 (Ct. App. Oct. 7, 2003).

At trial, the Michigan court allowed the prosecution to present similar-acts evidence through the statements of witnesses Kristen Oliver and Corrine Steinbrenner, both of whom testified that Smith inappropriately touched intimate areas of their bodies during searches following traffic stops in 1998. Although Sargent expressed uncertainty at trial as to whether digital penetration occurred, the court admitted her statement to Marinelli that Smith "put his finger inside her" as an excited utterance. The jury convicted Smith of three counts of second-degree criminal sexual conduct under Michigan law, and the Michigan Court of Appeals affirmed. The Michigan Supreme Court denied Smith leave to appeal, and in July 2005, Smith filed this habeas petition.[1]

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[1] It is unclear from the record whether Smith exhausted his post-conviction remedies, but "[w]e need not delve into the morass of procedural bar . . . because Petitioner's claim fails on the merits even *assuming* he properly exhausted available state court remedies." *Cyars v. Hofbauer*, 383 F.3d 485, 486 n.1 (6th Cir. 2004).

II. Standard of Review

We review the district court's decision to grant Smith's habeas petition de novo. *Ege v. Yukins*, 485 F.3d 364, 371 (6th Cir. 2007). Clear-error review governs our review of the district court's factual findings; de-novo review applies where the findings arose from state-court documents. *Id.*

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a federal court shall not grant a writ of habeas corpus:

> [W]ith respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). But this circuit holds that "[w]here . . . the state court did not assess the merits of a claim properly raised in a habeas petition, the deference due under AEDPA does not apply. Instead, this court reviews questions of law . . . de novo." *Maples v. Stegall*, 340 F.3d 433, 436 (6th Cir. 2003) (citations omitted); *see also Smith v. Ohio Dep't of Rehab. & Corr.*, 463 F.3d 426, 430 (6th Cir. 2006).

III. Analysis

In granting the petition, the district court agreed with Smith's arguments on two claims: prosecutorial misconduct and ineffective assistance of counsel. We analyze each in turn.

A. Prosecutorial-Misconduct Claim and Procedural Default

The warden argues that because Smith did not object to the prosecutor's conduct at trial, procedural default applies and the district court erred in reaching the merits of Smith's prosecutorial-misconduct claim. We agree.

Procedural default precludes a federal court from granting a writ of habeas corpus if: (1) "there is a state procedural rule that is applicable to the petitioner's claim and . . . the petitioner failed to comply with the rule," (2) the state court "actually enforced the state procedural sanction," and (3) "the state procedural forfeiture is an 'adequate and independent' state ground on which the state can rely to foreclose review of a federal constitutional claim." *Scott v. Mitchell*, 209 F.3d 854, 863–64 (6th Cir. 2000) (quoting *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986)). Only the second prong of the *Maupin* test is at issue here: whether the Michigan Court of Appeals enforced the procedural sanction.

The district court concluded that the state appeals court failed to enforce the procedural sanction by addressing Smith's claim on the merits. We read the appellate court's opinion differently. The state appellate court expressly concluded that Smith did not

preserve his prosecutorial-misconduct claim and reviewed the defaulted claim for plain error, discussing plain-error factors, including petitioner's "substantial rights" and "miscarriage of justice." *See Lundgren v. Mitchell*, 440 F.3d 754, 765 (6th Cir. 2006) ("Plain error analysis is more properly viewed as a court's right to overlook procedural defects to prevent manifest injustice, but is not equivalent to a review of the merits."); *Paprocki v. Foltz*, 869 F.2d 281, 284–85 (6th Cir. 1989); *People v. Rodriguez*, 650 N.W.2d 96, 110 (Mich. Ct. App. 2002). Procedural default thus bars Smith's claim.

Smith may hurdle this procedural bar, however, by demonstrating "cause for the procedural default and actual prejudice as a result of the alleged violation of federal law, or demonstrating that failure to consider the claims will result in a fundamental miscarriage of justice." *Girts v. Yanai*, 501 F.3d 743, 755 (6th Cir. 2007) (internal quotation marks and editorial marks omitted). Focusing his efforts on showing cause for the default, Smith asserts that ineffective assistance of counsel qualifies as "cause" in his case. *See Washington v. Hofbauer*, 228 F.3d 689, 698 (6th Cir. 2000) ("[I]neffective assistance of counsel can provide the necessary 'cause' for the procedural default"). A party must prove that (1) "counsel's performance was deficient," and (2) "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The second prong "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* Our strong presumption is that counsel "rendered adequate assistance." *Id.* at 690.

Smith argues that his counsel failed to object to statements representing unconstitutional prosecutorial misconduct. In order to show prejudice under *Strickland*, he must "establish that but for the alleged error of his trial counsel in not objecting . . . assuming that the prosecutor committed misconduct . . . there is a reasonable probability that the result of the proceeding would have been different." *Hinkle*, 271 F.3d at 245. We conclude that he cannot make that showing.

The challenged statements fall into five categories. First, Smith targets the similar-acts evidence that the prosecutor purportedly used to show Smith's propensity to commit the alleged criminal sexual act. The prosecutor stated that "[Smith had] done it before—He started off with Kristen [Oliver]," and argued that, "after [complaints from] three girls," the police department probably wished they had done "something more." But the judge's instructions about this similar-acts evidence prevented it from affecting Smith's substantial rights:

> You may only think about it [sic] whether this evidence tends to show the following . . . the defendant used a plan, system, or characteristic scheme that he has used before or since. You must not consider this evidence for any other purpose. For example, you must not decide that it shows that the defendant is a bad person or that he's likely to commit crimes.

See Roe v. Baker, 316 F.3d 557, 566 (6th Cir. 2002) (concluding, on plain-error review, that "appropriate instructions . . . cured any misperception that the jury might have received from the prosecutor's

arguments."). Moreover, the prosecutor prefaced her "done it before" comment by reminding the jury of the judge's instruction. *See Byrd v. Collins*, 209 F.3d 486, 537 (6th Cir. 2000) (concluding that improper remarks "did not mislead the jury at all" where "the prosecutor told the jury during his closing argument that his argument was not evidence.").

Second, Smith alleges that the prosecutor personally attacked defense counsel by accusing him of making Sargent cry. That alleged attack, however, bears no relation to Smith's guilt or innocence, and Smith offers no argument why, had his counsel objected, "the result of the proceeding would have been different." *Hinkle*, 271 F.3d at 245. Our independent review of the record convinces us that no reasonable likelihood exists that an objection would have changed the outcome of the proceedings.

Third, Smith presses that the prosecutor improperly injected her own opinion into the proceedings. But read in context, *see United States v. Young*, 470 U.S. 1, 11 (1985) ("[A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context . . . ."), the comments Smith targets came in response to defense counsel's closing arguments, *see United States v. Collins*, 78 F.3d 1021, 1040 (6th Cir. 1996) (finding prejudicial effect minimized where defense counsel's argument invited the improper statements of prosecutor's personal opinion); *see also Byrd*, 209 F.3d at 535 ("Case law permits comments that are made in response to the argument and strategy of defense counsel." (internal quotation marks omitted)). When the prosecutor opined that "we would believe" Sargent

if Sargent testified that penetration occurred, she did so only in response to defense counsel's insinuation that Sargent's alleged memory loss undermined her credibility. Similarly, the prosecutor's declaration that she was not "going after a person who's not guilty" countered defense counsel's closing remark that given the option, he would ask the jury to find Smith factually innocent rather than merely not guilty. Viewed in the context of the prosecutor's entire closing argument, the "going after" statement came as an attempt to distinguish the State's case from a witch hunt. In fact, the prosecutor immediately followed the statement with a reminder that substantial evidence supported the State's case ("This is about the People of the State of Michigan versus the defendant. That's it. There was a thorough investigation . . . ."). Prosecutorial vouching rarely warrants a new trial. *Compare Byrd*, 209 F.3d at 537 (noting that the court has never granted habeas relief on the basis of improper vouching), *with Bates v. Bell*, 402 F.3d 635, 646 (6th Cir. 2005) (finding improper injections of prosecutor's personal beliefs, among other instances of misconduct, grounds for habeas relief).

Fourth, Smith contends that the prosecutor argued evidence not of record by asking "How about it's common in sexual assault victims to repress the most significant thing that happened here, the worst thing?" Once again, this comment responded to defense counsel's attack on Sargent's credibility, when he argued that her claim to have forgotten whether penetration occurred "is going to be one for the psychological books." Plus, because this came only as a possible explanation for Sargent's memory loss, the jury would be unlikely to view it as factual rather than speculative. *See Byrd*, 209 F.3d at 536 (finding that

where the prosecutor's comments seem speculative, jurors "would not be confused into believing that these comments were factual evidence.").

Finally, Smith points to the prosecutor's declaration in rebuttal that returning a not-guilty verdict would be akin to saying "I'd be okay with having my daughter stopped by [Smith] at three in the morning." Although this comment appealed to jurors' emotions, we find it less likely to prejudice or mislead the jury than those statements in the cases cited by the district court. *See Bates*, 402 F.3d at 642 ("If you . . . choose not to execute the defendant, you have passively issued a warrant of execution for someone else."); *Gall v. Parker*, 231 F.3d 265, 315 (6th Cir. 2000)("Now folks are we going to turn [defendant] loose on society by reason of insanity[?]").

Moreover, all of the alleged misconduct occurred during the prosecutor's closing and rebuttal statements. *See Pritchett v. Pitcher*, 117 F.3d 959, 964 (6th Cir. 1997) ("In order to constitute the denial of a fair trial, prosecutorial misconduct must be so pronounced and persistent that it permeates the entire atmosphere of the trial." (internal quotation marks omitted)). And the judge followed closing arguments with the appropriate limiting instruction:

> The lawyers' statements and arguments are not evidence. They're only meant to help you understand the evidence and each side's legal theories. . . . You should only accept things the lawyers say that are supported by the evidence or by your own common sense and general knowledge.

See Wilson v. McMacken, 786 F.2d 216, 219 (6th Cir. 1986) (concluding that defendant could not establish prejudice under *Strickland* where trial judge provided jury with limiting instruction before and after prosecutor's closing argument containing contested statements); *see also United States v. Carter*, 236 F.3d 777, 787 (6th Cir. 2001) ("Ordinarily, a court should not overturn a criminal conviction on the basis of a prosecutor's comments alone, especially where the district court has given the jury an instruction that may cure the error."); *Byrd*, 209 F.3d at 537 (concluding, in a habeas case, that limiting instruction was one reason alleged misconduct did not mislead jury). Given that "juries are presumed to understand and follow directions from the court," *Carter*, 236 F.3d at 787, we conclude that the prosecutor's statements did not "confuse or improperly influence" the jury, *see Byrd*, 209 F.3d at 538.

Because Smith cannot establish "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *Strickland*, 466 U.S. at 694, he cannot show ineffective assistance of counsel as "cause" to excuse procedural default of his prosecutorial-misconduct claim, *see Hinkle*, 271 F.3d at 246. The district court erred in concluding otherwise.

B. Ineffective Assistance of Counsel

Although in our cause-and-prejudice analysis we concluded that the defense's failure to object to the prosecutor's statements did not constitute ineffective assistance of counsel, Smith's petition suggests that two other deficiencies in his counsel's performance rendered his trial outcome unreliable. As discussed

earlier, to prevail on this claim, Smith must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. And, as before, we start with a strong presumption that defense counsel furnished reasonable assistance. *Id.* at 689. As for our review, even though the Michigan Court of Appeals reviewed Smith's ineffective-assistance-of-counsel claim on the merits, it is unclear whether the court properly applied *Strickland*. But we need not decide whether AEDPA governs, because Smith's claim fails even under de novo review. *See Baze v. Parker*, 371 F.3d 310, 320 (6th Cir. 2004).

First, relying on *Doyle v. Ohio*, 426 U.S. 610 (1976), Smith alleges that the prosecutor improperly used his silence to impeach his testimony at trial without objection from defense counsel, *see id.* at 618 ("[I]t would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial."). We reject this argument, concluding that Smith mischaracterizes the prosecutor's conduct. At trial, Smith testified that he had no opportunity to tell his side of the story. On cross-examination, the prosecutor referenced that testimony and showed that an opportunity had existed with two questions to Smith: whether Smith knew of Detective Miller's involvement in the case and whether Smith had contacted Miller to explain what happened with Sargent. To assess whether these questions constitute *Doyle* error, we ask whether the prosecutor referred to the defendant's post-arrest silence so that the jury would draw "inferences of guilt from [the] defendant's decision to remain silent after . . . arrest." *See Gravley*

v. Mills, 87 F.3d 779, 788 (6th Cir. 1996). In this case, the prosecutor referenced Smith's silence to cast doubt on Smith's earlier claim that he never received an opportunity to explain himself, not to exploit Smith's silence as probative of guilt. *See id.*; *United States v. Martinez-Larraga*, 517 F.3d 258, 268 (5th Cir. 2008) ("*Doyle* also expressly recognizes that a prosecutor's reference to [post-arrest silence] may *properly* be made where it is *not* used to impeach the defendant's exculpatory story, or as substantive evidence of guilt, but rather to respond to some contention of the defendant concerning his post-arrest behavior." (internal quotation marks omitted)). Because Smith fails to establish that the prosecution committed *Doyle* error, he cannot show "a reasonable probability" that but for his counsel's lack of objection, "the result of the proceeding would have been different."

Second, Smith argues that defense counsel should have objected to the admission of several witnesses' testimony describing Sargent's out-of-court statements about Smith. Relying on *Tome v. United States*, 513 U.S. 150 (1995), the district court agreed, concluding that "it is error to admit corroborating hearsay in order to buttress the credibility of a complainant." Both Sargent and Marinelli testified that after Smith dropped them off at Denny's, Sargent told Marinelli that Smith's search included digital penetration. Sargent's mother testified that upon arriving home, Sargent said that Smith searched her beneath her clothes. Defense counsel objected to Marinelli's statement, but withdrew his objection once the trial court decided to admit the statement as an excited utterance, and accordingly did not object to either of the other statements.

The Michigan Court of Appeals concluded that it was within the trial court's discretion to admit all three statements, and that, even if Sargent's statement to her mother were not an excited utterance, it was cumulative of Sargent's own testimony and any error was harmless. Smith disputes the state's court's determination, but on habeas review, we do not "decide whether a state trial judge's decision whether to admit evidence pursuant to state evidentiary rules was a proper one. Our sole task is to decide whether federal constitutional violations have occurred." *Byrd*, 209 F.3d at 528. Smith cannot establish that his counsel's failure to object prejudiced his defense; therefore, his ineffective-assistance-of-counsel claim must fail.

IV. Conclusion

Because we conclude that Smith cannot show cause and prejudice to excuse procedural default of his prosecutorial-misconduct claim, and because Smith's ineffective assistance-of-counsel claim is without merit, we REVERSE the judgment of the district court granting the writ of habeas corpus, and REMAND for consideration of Smith's remaining claims.

Cole, Circuit Judge, concurring. The Constitution entitles a criminal defendant to a fair trial, not a perfect one, *Delaware. v. Van Arsdall*, 475 U.S. 673, 681 (1986), and although this is a close case, I agree with the result reached by the majority because the prosecutorial misconduct at issue did not so infect the trial with unfairness as to make the conviction a denial of due process, *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). I write separately to highlight the fact that the prosecutor in this case made several comments that constituted misconduct, one of which was particularly serious.

I. LEGAL STANDARDS

A. Standard of review

When considering prosecutorial-misconduct claims on habeas review, "the relevant question is whether the prosecutor's comments so infected the trial with unfairness as to make the conviction a denial of due process." *Lundgren v. Mitchell*, 440 F.3d 754, 778 (6th Cir. 2006) (quotation omitted). If the state courts have ruled on a petitioner's non-defaulted prosecutorial-misconduct claims, those rulings are entitled to heightened AEDPA deference. *Id.* Here, the Michigan state courts reviewed Smith's prosecutorial-misconduct claim only for plain error, so there is no merits decision to which we could defer under AEDPA. *See White v. Mitchell*, 431 F.3d 517, 527 (6th Cir. 2005). However, Smith's claim has been procedurally defaulted, so we cannot review it unless he demonstrates "cause for the procedural default and actual prejudice as a result of the alleged violation of federal law, or demonstrat[es] that failure to consider the claims will result in a fundamental miscarriage of

justice." *Girts v. Yanai*, 501 F.3d 743, 755 (6th Cir. 2007) (internal quotation marks and editorial marks omitted). Unlike the majority, I begin my analysis with the prejudice inquiry, rather than the cause inquiry. The prejudice inquiry essentially overlaps with the question of whether the prosecutor's comments so infected the trial with unfairness as to make the conviction a denial of due process. *Cf. Banks v. Dretke*, 540 U.S. 668, 691 (2004) (noting that "prejudice" prong of procedural default analysis parallels prejudice prong of a *Brady* prosecutorial-misconduct claim). Because I find that the prosecutor's comments did not so infect the trial, Smith has not demonstrated prejudice sufficient to overcome the procedural default, and I do not reach the cause inquiry.

B. Prosecutorial misconduct analysis

"When addressing claims of prosecutorial misconduct, we first determine whether the challenged statements were indeed improper." *Boyle v. Million*, 201 F.3d 711, 717 (6th Cir. 2000). "Upon a finding of such impropriety, we then 'look to see if they were flagrant and warrant reversal'" because only a retrial could correct the error. *Id.* (quoting *United States v. Francis*, 170 F.3d 546, 549 (6th Cir. 1999)). We use a four-factor test to analyze the flagrancy of alleged instances of prosecutorial misconduct: 1) whether the prosecutor's statements tended to mislead the jury or prejudice the accused; 2) whether the misconduct was isolated or extensive; 3) whether the misconduct was

deliberate;[1] and 4) the total strength of the evidence against the accused. *Id.*

In cases heard on direct appeal, rather than through habeas review, we have held that "[t]here are instances where a single misstep on the part of the prosecutor may be so destructive of the right to a fair trial that reversal is mandated." *See United States v. Carroll*, 26 F.3d 1380, 1387 (6th Cir. 1997) (reversing conviction where prosecutor inappropriately and misleadingly vouched for credibility of government witnesses where proof of guilt was not overwhelming) (citing *United States v. Solivan*, 937 F.2d 1146, 1150 (6th Cir. 1991)). In *Solivan*, we reversed a defendant's conviction where the prosecutor, in his closing argument, urged the jury to find the defendant guilty, saying "I'm asking you to tell [defendant] and all of the other drug dealers like her . . . that we don't want that stuff in Northern Kentucky . . . ." *Id.* at 1148. We held that this single statement was "so inflammatory in the context of the ongoing drug war" that it deprived the defendant of a fair trial. *Id.* at 1155. To the extent that the majority, quoting *Pritchett v. Pitcher*, 117 F.3d 959, 964 (6th Cir. 1997), suggests that habeas relief based on prosecutorial misconduct is not available unless the misconduct occurred throughout the entire trial, rather than merely during counsel's arguments, I disagree. The full quote from *Pritchett* states, "prosecutorial misconduct must be so pronounced and persistent that it permeates the entire atmosphere of

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[1] We have also said, however, that the prosecutor's intent is irrelevant: "the touchstone of due process analysis . . . is the fairness of the trial, not the culpability of the prosecutor." *Hutchinson v. Bell*, 303 F.3d 720, 750 (6th Cir. 2002).

the trial, *or* so gross as probably prejudice the defendant." *Id.* (internal citations and quotation marks omitted) (emphasis added). If a single instance of prosecutorial misconduct is so prejudicial that it infects the defendant's whole trial with unfairness and deprives him of due process, the defendant is surely entitled to habeas relief.

II. APPLICATION

While I agree with the majority's conclusion that many of the challenged prosecutorial comments were proper and that the district court overstated the extent of the prosecutorial error at issue, the majority does not adequately acknowledge the several clearly improper comments the prosecutor made in this case. Below, I discuss these comments in order of their potential for prejudice, beginning with what I deem to be the most serious error. I then analyze whether, taken together, these comments deprived Smith of a fair trial.

A. The instances of misconduct

By far the most troubling instance of misconduct came at the close of the prosecutor's rebuttal argument, when she stated to the jury:

> You all took an oath to return a fair and just verdict. Coming back with a not guilty, you'd have to look at Shannon Sargent and say, "I don't believe you." And Kristin Oliver, "I don't believe you." And Corrinne, "I don't believe you." You have to tell the Oakland County Sheriff's Department, "You know what? *I'd be okay with*

> *my daughter being stopped by him at three in the morning.*".
>
> I ask that you return the right verdict, and that's guilty as charged on all three counts.
>
> Thank you.

(JA 432 (emphasis added).) The prosecutor clearly intended this statement to appeal to the passions and prejudices of the jurors. By placing in the jurors' minds the thought of their own daughters being stopped by a police officer accused of committing a sexual crime, the prosecutor made it less likely that the jurors would decide the case on the basis of the evidence before them and more likely that they would convict Smith because of their subjective fears about sexual predation. *See Gall v. Parker*, 231 F.3d 265, 315 (6th Cir. 2000) (granting relief based on "egregious" misconduct where prosecutor urged jurors not to "turn [the defendant] loose on society"); *Bates v. Bell*, 402 F.3d 635, 642 (6th Cir. 2005) (granting habeas relief where prosecutor warned jurors that a decision not to execute defendant was equivalent to "passively issu[ing] a warrant of execution for someone else"). The majority opinion falls short in that it fails to recognize the potentially serious harm presented by the prosecutor's comment. I see little difference between the "I'd be okay with my daughter being stopped by him" comment and those comments that contributed to grants of relief in *Gall v. Parker* and *Bates v. Bell*.

Second, the prosecutor's comment to the jury that "[t]his is not going after a person who's not guilty . . . [;] [t]hat would be every prosecutor's worst nightmare,"

(JA 419), was improper because it expressed the prosecutor's own belief that Smith was guilty. *See Carroll*, 26 F.3d at 1384-85 ("[S]tatements of personal belief on the part of a prosecutor may have a 'devastating impact' on a jury." (quoting *United States v. Bess*, 593 F.2d 749, 755 (6th Cir. 1979))). Statements by the prosecutor carry "the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *United States v. Young*, 470 U.S. 1, 18-19 (1985). The jury could also infer from such statements that the prosecutor knows of additional evidence of the defendant's guilt that was not presented at trial. *See id.*; *Gall v. Parker*, 231 F.3d at 312. The prosecutor's task is to put on evidence and argue inferences from that evidence; her "personal opinion has no place at trial." *Carroll*, 26 F.3d at 1384 (internal quotation marks omitted).

The majority excuses this comment because it was arguably a response to a statement by the defense counsel that he wished the jury had the option of affirmatively proclaiming Smith "innocent," rather than merely "not guilty." However, even if the prosecutor's "worst nightmare" comment is viewed as a response to the defense's argument, this does not render the comment permissible.[2] Prosecutorial

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[2] At times, questionable prosecutorial comments may be proper because they are "made in response to the argument and strategy of defense counsel." *Byrd v. Collins*, 209 F.3d 486, 535 (6th Cir. 2000). For example, I agree with the majority that after Smith's counsel argued that Sargent's alleged repression of the memory of penetration was "going to be one for the psychology books" (JA 400-01) because it was not the type of situation in which people typically suppress memories, it was not misconduct for the

vouching is forbidden, even in response to a credibility challenge by the defense. *See United States v. Collins*, 78 F.3d 1021, 1040 (6th Cir. 1996) (prosecutor's statement of personal belief was improper even though it came in response to defense argument; however, the fact that the statement was a response did minimize its prejudicial effect).

Third, the prosecutor improperly stated that if Sargent had testified that Smith penetrated her during the search, "we would believe her." (JA 426.) Again, the majority states that this was only a response to defense counsel's argument that Sargent's memory loss made her not credible, but it bears repeating that a prosecutor is not permitted to vouch personally for a witness's veracity, even in response to a credibility challenge by the defense. The prejudicial effect of this particular comment, however, is small. It is phrased as a hypothetical, stating only that the prosecutor "would" believe Sargent "if" she changed her story. At most, this comment might have led the jury to infer that the prosecutor generally found Sargent to be a credible person. On the other hand, the jury might also have found the comment to undercut the prosecution's own credibility, since the comment suggests that the prosecutor would indiscriminately believe Sargent's story, regardless of which version she asserted. This comment did not have significantly affect the trial overall.

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prosecutor to respond: "How about it's common in sexual assault victims to repress the most significant thing that happened . . . ?" (JA 425). Although Smith claims that the prosecutor committed misconduct by arguing facts not in the record, the prosecutor was reasonably reacting to an argument strategy initiated by the defense.

Fourth, the prosecutor stated "[s]eriously, why is [defense counsel] making a 19-year-old girl cry [on the stand]?" (JA 421.) Prosecutors should not level personal attacks against defense counsel, and trial courts should not countenance such conduct. *See Carter*, 236 F.3d 777, 785 (6th Cir. 2001). However, the likelihood that this statement significantly impacted the trial is small, as the prosecutor merely accused the defense counsel of being insensitive, and, in any case, the jurors witnessed the defense counsel's conduct themselves and could form their own impressions of it. *Cf. id.* (prosecutor repeatedly accused defense counsel of lying to the jury).

B. The misconduct did not deprive Smith of a fair trial

The next step in the analysis is to determine whether these instances of misconduct were flagrant. Under the first prong of the test, only two of the prosecutor's comments had real potential to "mislead the jury and prejudice the defendant." *Boyle*, 201 F.3d at 717. The less serious of the two was the prosecutor's remark suggesting that she personally believed the defendant was guilty. While plainly improper, this comment was not particularly egregious: it did not suggest to the jury that the prosecutor knew of additional evidence of guilt that was not available to them, and, as the majority points out, its prejudicial effect was lessened by the fact that it was a response to a comment by the defense counsel. On its own, this comment did not mislead the jury and likely did not seriously prejudice the defendant. However, it could certainly contribute to a finding that, cumulatively, the misconduct amounted to a due process violation. *See, e.g.*, *Bates*, 402 F.3d at 646

(prosecutor's vouching among factors contributing to grant of habeas based on misconduct).

The more misleading and prejudicial instance of misconduct was the "I'd be okay with my daughter being stopped by him" comment, which not only was a patent appeal to the juror's fears and prejudices, but had a particularly strong potential to influence the jury because it was the last piece of argument they heard before deliberating. The majority is correct that this error was lessened by the district court's subsequent jury instructions stating that the lawyers' arguments are not evidence, and that the jury should "should only accept things the lawyers say that are supported by the evidence or by your own common sense" and should "think about each witness and each piece of evidence and whether you believe them . . . [and] decide whether the testimony and evidence you believe proves beyond a reasonable doubt that the [defendant] is guilty." (JA 433, 435.) However, curative instructions do not always eradicate the harm caused by a prosecutor's inappropriate statement. *See, e.g.*, *United States v. Payne*, 2 F.3d 706, 715 (6th Cir. 1993) (reversing conviction, on direct appeal, where curative instructions did not eradicate harmful effect of misconduct); *Solivan*, 937 F.2d at 1157 (same). The instructions in this case, while certainly helpful, did not address directly the harm posed by the "I'd be okay with my daughter being stopped by him" comment, which was not that the jury would *mistake* it for evidence, but that the jury would allow its fears and passions to influence its decision *instead of* limiting its consideration to the evidence in the record. Thus, with respect to the prosecutor's "I'd be okay with my daughter being stopped by him" comment, the first

prong leans in favor of finding the misconduct to be flagrant.

Under the second prong, the misconduct was isolated and not extensive. There were several minor instances of misconduct, but only one major instance. The district court incorrectly found that this prong weighed in favor of flagrancy because the district court was mistaken about the number of instances of misconduct that had occurred. However, as suggested above, the fact that the misconduct was isolated to one or two remarks is merely one consideration and is not determinative. Under the third prong, the "I'd be okay with my daughter being stopped by him" comment was clearly deliberate. The prosecutor intended it to be the final idea planted in the minds of the jurors before they began deliberating.

Under the fourth prong, the total strength of the evidence against Smith was strong but not overwhelming. The evidence consisted primarily of Sargent's testimony, buttressed by the testimony of two similar-acts witnesses, Oliver and Steinbrenner, who also claimed that Smith inappropriately sexually touched them during searches of them. If the jury believed these witnesses rather than Smith, the evidence against Smith was strong, but there was no physical evidence or third-party-witness account to corroborate Sargent's claims. Sargent's boyfriend, Peter Marinelli, testified that Smith took Sargent to his police car for about fifteen minutes and required Marinelli to wait in his own car. Marinelli did not have a clear view of police car because, as Smith admitted at trial, Smith intentionally adjusted Marinelli's car mirror to prevent him from being able to see Smith as he questioned Sargent.

Cases involving alleged sexual misconduct often turn on the relative credibilities of the defendant and the prosecuting witness with little other evidence for the jury to consider. *Martin v. Parker*, 11 F.3d 613, 616-17 (6th Cir. 1993). Like the district court, I am mindful of the fact that it is particularly important in such cases to ensure that juries base their decisions on the evidence before them, not on prejudices and fears raised by inappropriate prosecutorial conduct. *See Washington v. Hofbrauer*, 228 F.3d 689, 708 (6th Cir. 2000); *Martin*, 11 F.3d at 616-17. Accordingly, though I find that this prong is close to neutral, it cuts slightly in favor of Smith.

In sum, the misconduct in this case boils down to one highly inappropriate comment that was deliberately calculated to inflame the fears and passions of the jurors, as well as one other potentially prejudicial comment about the prosecutor's personal belief that the defendant was guilty. I find this to be a much closer case than the majority. The misconduct occurred in the type of case in which it is particularly important that such passions *not* be the basis for the jury's decision. Furthermore, in a case on direct appeal involving a single instance of misconduct similar to the "I'd be okay with my daughter being stopped by him" comment, we held that a new trial was required, even though the trial judge attempted to cure the misconduct with an instruction to the jury. *See Solivan*, 937 F.2d at 1157. Finally, at least two prongs of the flagrancy analysis, and arguably three, point in favor of finding the prosecutor's misconduct to be flagrant.

Nonetheless, I agree with the result reached by the majority because I cannot say that the prosecutor's

misconduct so infected Smith's trial with unfairness as to deprive him of due process. The presentation of evidence to the jury proceeded properly, and Smith was able to testify and cross-examine the prosecution's witnesses free of any misconduct. I am persuaded that the jury based its decision on the evidence before it, not on the prosecutor's inappropriate rhetoric in argument. The jury presumably followed the judge's instructions, which, while not perfect, did convey that the jury was required to base its decision on the evidence before it, not on the lawyers' remarks. While the prosecutor's error was a serious one, Smith received a fair trial and was not deprived due process.

III. CONCLUSION

For the foregoing reasons, I concur in the result reached by the majority and thus would reverse the judgment of the district court granting the writ of habeas corpus and remand for consideration of Smith's remaining claims.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

Case Number: 05-CV-72971
Honorable George Caram Steeh

[Filed September 25, 2007]

BRENT SMITH,	)
	)
Petitioner,	)
	)
v.	)
	)
KURT JONES,	)
	)
Respondent.	)
	)

OPINION AND ORDER CONDITIONALLY GRANTING PETITION FOR WRIT OF HABEAS CORPUS

Petitioner Brent Smith, a Michigan state prisoner, has filed an application, through his attorney, for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Smith was convicted by a jury in Michigan's Oakland County Circuit Court on three counts of criminal sexual conduct in the second degree. Smith was sentenced on each count to a minimum of four years,

and a maximum of fifteen years, the sentences to run concurrently. For the reasons set forth below, the Court conditionally grants Smith's petition for writ of habeas corpus.[1]

I.

Smith's convictions arise from an incident occurring in the early hours of December 23, 2000, in the City of Berkley, Michigan. During a routine patrol of the rear of the Berkley Front Bar, Smith, a Berkley police officer, investigated two allegedly intoxicated minors, Shannon Sargent and Peter Marinelli, in a parked car. Sargent, who admitted that she was intoxicated and an under-age drinker, claimed that Smith improperly searched her underneath her clothes in the back of his scout car, touching intimate areas of her body. Smith denied searching Sargent improperly at any time.

Sargent, the complainant in this case, testified that there was not one search, but rather, there were two searches. She testified that she did not object to the first search; rather, it was the second search, where Smith went under her clothing and touched intimate areas, that was objectionable, though she consented at the time. When questioned about drinking, Sargent admitted that, although she was underage, she had consumed several vodkas and had a driver's license of another person as her false identification card. It was Sargent's testimony that she was "buzzed" and was making out with her boyfriend in his car behind the

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[1] This Court will only discuss the facts relevant to the resolution of the claims on which Petitioner is being granted habeas relief.

Berkley Front Bar when Officer Smith investigated their parked car.

According to Sargent's testimony, Smith told her that there was a drug problem in the area and requested to search her. She testified that Smith first patted her down in his squad car, with her consent. Sargent said that Smith told her that her male companion had consumed too much alcohol to drive, and performed a PBT on both of them. Subsequently, according to Sargent's testimony, Smith asked to search her again. She testified that she consented to the second search.

Regarding the second search, Sargent testified that Smith said, "I hate doing this. Do you want a woman cop?" Sargent said that she didn't know whether she wanted a female officer to conduct the search, rather, she testified that she just wanted to get it over. It was her testimony that Smith told her what he was doing as he was searching her; and, in the process of the search, Sargent testified that he went inside her clothing, touched and rubbed her genital area very quickly, felt around her stomach, went down the front of her dress and went down her back. Sargent testified that the second search occurred about ten to fifteen minutes after she was given the PBT test, and before the second officer arrived on the scene. According to Sargent's testimony, she never refused Officer Smith permission to search under her clothing. No one else who was present at the Berkley Front Bar witnessed the second search.

Officer Robert Ginther, also an officer with the Berkley Police Department, arrived on the scene as back-up. He testified that Smith told him that he

(Smith) had caught a couple of lovers in a car, that both of them were too intoxicated to drive, and that he (Smith) was going to give them a break and drive them to Denny's Restaurant. Officer Ginther testified that when he arrived, he saw Smith bringing the PBT back through the divider of his squad car and witnessed that it looked like it had been activated. Officer Ginther testified that he did not see Smith search Sargent.

Sargent's boyfriend, Peter Marinelli also testified. He said that he witnessed a conversation between Sargent and Smith in the patrol car, but never saw Sargent searched. It was his testimony that Smith was alone with Sargent for about fifteen minutes.

Marinelli admitted that he and Sargent were underage and that they had been drinking. He said that he had consumed six mixed drinks on the evening in question. He admitted that he was under the influence. He also admitted that he was kissing and fondling Sargent in his car when Smith pulled up to his car.

Marinelli testified that Smith searched him before he entered the back of the squad car, where Sargent was sitting. It was Marinelli's testimony that Smith told him that he blew .05 on the PBT, and that Sargent blew .20, and was unable to drive. He said that, at one point, while he was waiting for Sargent in his car, Smith walked up to his car and said, "you're scaring me," and pushed his side-view mirror upward. Marinelli then said that Smith drove them to Denny's. Neither Sargent nor Marinelli was ticketed or arrested.

Smith testified. According to his testimony, he detained and searched Sargent and Marinelli during a routine patrol of the rear of the Berkley Front Bar. He said that previously he had arrested individuals for using drugs, and had caught individuals having sex, behind that bar. Smith said that when he shined a flashlight in the car occupied by Sargent and Marinelli, he saw a male leaning over the top of a female, with the seat reclined; the male was fondling the female and kissing her. When Smith knocked on the window, Marinelli jumped back into the driver's seat, zipping his pants. As Sargent was putting her clothes back together, Smith could see that she was upset and crying. Smith testified that, while he was investigating, he had smelled burning marijuana, but did not smell marijuana from inside the car; however, he did smell a strong odor of intoxicants coming from both Sargent and Marinelli.

Smith asked Sargent for some identification–she produced an expired driver's license with the name of Melissa Masouras on it. According to the license, Melissa was twenty-two-years old. Smith asked Sargent to step out of the car and, then, he contacted dispatch, telling them that he was continuing on with his investigation. Because Sargent appeared intoxicated, according to Smith's testimony, he escorted her back to his car. He testified that, as they were walking back to his car, Sargent stumbled and had to use the car for guidance in walking.

Smith testified that he then asked Sargent if he could search her or if she wanted a female officer. Sargent consented to the search. According to Smith's testimony, there were no female officers working for the Berkley Police Department on the midnight shift,

and the search policy was to search females the same way you would a man. Smith testified that he had personally searched female arrestees twenty to forty times. Smith said that he searched Sargent a single time over her clothes, before he placed her in his squad car.

Smith testified that he also searched Marinelli, and his vehicle, with consent. When he found nothing illegal in his searches, he asked Marinelli to have a seat in his own (Marinelli's) car.

According to Smith's testimony, Sargent told him that she knew Marinelli and that the incident was a consensual situation. She told him that she was really eighteen-years-old, that Marinelli was twenty, and that they both had fake identification cards. Marinelli then produced two fake identification cards, which Smith confiscated.

When Smith dropped Sargent off at Denny's, she was still very upset. Marinelli testified that he thought she was upset from getting caught drinking underage. After Smith dropped them off at Denny's, he realized that he forgot to retrieve Sargent's false identification card; he then returned to Denny's to get the card.

Both Smith and Officer Ginther talked to the manager of the Berkley Front Bar regarding permitting underage drinking. According to Smith, he did not make a report; rather, he talked to his shift commander who told him he did not have to make a report and to hang on to both Sargent's and Marinelli's fake identification cards.

Before the trial commenced, the trial court ruled, over objections by defense counsel, that the prosecution could also present two other female witnesses, Corrine Steinbrenner and Kristin Oliver, as similar acts witnesses. The trial court found that their credibility and veracity was a question for the trier of fact, found that their allegations against Smith were close and similar, and found that the evidence was relevant to showing a plan, scheme, or system that Petitioner may have used, and that their testimony was relevant to rebut any fabrication.[2]

Oliver was first to take the stand and testified that, in 1998, Smith arrested her for drunk driving. She admitted that she was intoxicated. She testified that, at the scene of the arrest, Smith searched her outside her clothes, handcuffed her, and then drove her to the Berkley police station. According to Oliver's testimony, when she arrived at the police station, she said that Smith then performed a second search, where he tried to go inside her bra and inside her pants, but because her undergarments were tight, he was unsuccessful. It was Oliver's testimony that when she requested to go to the bathroom, Smith told her

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[2] However, after hearing the testimony of Oliver and Steinbrenner, the trial judge concluded at sentencing that their allegations lacked credibility and were "vague and ambiguous."

> The other two women–the jury discounted and, frankly, I found so vague and ambiguous in their testimony, that the Court can give no weight to it. I'm going to be very blunt. The, there was–the second was almost ludicrous, and the first one's credibility was, frankly, destroyed by Mr. Correll in his cross-examination. (Sentencing Tr. p. 10.)

that she would have to remove the tight undergarments. Subsequently, according to Oliver's testimony, Smith then conducted another search of her person, where he went inside her pants and cupped her vagina. Oliver claimed that Smith had confiscated her underwear. According to her testimony, there were at least two other officers present in the station when the searches allegedly occurred. She said that she was not aware that there were video cameras in the area where she was searched that recorded her conduct at the time of the incident.

On cross-examination, Oliver admitted that she was given back all her belongings, including her underwear. Oliver became aware of this case because of its publicity. She testified that once she became aware, she then filed a federal lawsuit against the Berkley police department and Smith.

When Smith was questioned about the alleged incident with Oliver, he confirmed that he had arrested her, after she made an illegal turn, and ran a red light. He testified that she blew .12 on the PBT. Smith also confirmed that he searched her when he placed her in the holding cell, but he said that he searched her the same way he had searched her on the road, and that the search was in the presence of other officers. Smith denied any improper search of Oliver's intimate areas. He also testified that there were videotapes of the area where the search was conducted, which were kept for several months, but were no longer available. It was Smith's testimony that he never confiscated an undergarment from Oliver.

Steinbrenner, the second 404(B) witness, testified that in June 1998, at about 3:00 a.m., she was driving her friend's car when she was stopped by Smith for failing to stop at a stop sign and failing to use her turn signal. Steinbrenner was sixteen years old at the time, and she did not have a driver's license. However, when stopped and asked by Smith if she had a driver's license, Steinbrenner lied and said that she had a license, but that it was at her house. Smith arrested her for driving without a license.

According to Steinbrenner's testimony, Smith searched her over her clothing outside her car at the scene of the arrest. She said that he also searched her friend and the car. It was Steinbrenner's testimony that Smith searched her a second time, groping her breast for about five seconds during the search. Steinbrenner said that she did not file a complaint immediately but waited several days. Eventually, Steinbrenner went to the Berkley police station, with her mother and father, and filed a complaint, although she testified that, to her knowledge, nothing happened with the complaint. During cross-examination, Steinbrenner admitted to making inconsistent statements as to how many times Smith grabbed her breasts or when he grabbed her breasts.

Smith admitted that he arrested Steinbrenner after she ran a stop sign and turned without signaling. He said that he took her to the patrol car and searched her, but said that he never cupped or grabbed her breasts. Smith testified that he took her to the police station and gave her a ticket. He said that her mother picked her up at the station. Smith said that he also gave a traffic citation to the male who had permitted Steinbrenner to drive. According to Smith's testimony,

he had been advised that Steinbrenner made a telephone complaint. Smith denied any wrongdoing. The department did not discipline Smith for the matter.

Sergeant Raymond Anger, a detective at the Berkley Police Department, and a witness for the prosecution, testified that he executed a search warrant for Smith's locker and found Melissa Masouras's driver's license and other confiscated driver's licenses of male drivers. According to his testimony, the Berkley police officers do not always file a report if they let someone go on an OUIL. It was his testimony that the officers cannot tag evidence unless there is a report. Sergeant Anger testified that the police records showed that Smith checked Melissa Masouras's and Peter Marinelli's driver licenses on the state lien system on December 23, 2000, and that Smith was investigating a parked car at the Berkley Front Bar from 1:46 a.m. to 2:12 a.m. on that date.

Regarding the Steinbrenner complaint, it was also Sergeant Anger's testimony that there was no reprimand or disciplinary action taken against Smith. He said that the decision not to discipline was the decision of the Berkley chief of police. Sergeant Anger testified that he had nominated Smith as Officer of the Year in 1999.

In rebuttal, the prosecution called Berkley police chief, Bruce Henderlight. He testified that Anger's testimony and Smith's testimony regarding Smith not being disciplined for the Steinbrenner complaint was wrong. Officer Henderlight testified that there were no other complaints of a sexual nature against any other Berkley police officers. Defense counsel did not

object to that line of questioning. Officer Henderlight also admitted that there were no female officers working the midnight shift on the day in question.

Because there was extensive pre-trial publicity that Sargent had passed a polygraph, some, not all, jurors, during *voir dire*, were asked if they had formed an opinion based on what they had read in the newspaper. They were not asked how what they read affected them. Additionally, many of the jurors were never asked if they were exposed to any pre-trial publicity.

During the prosecution's closing argument, and during rebuttal, the prosecutor asked the jury to rely on the testimonies of the "similar-acts" witnesses to determine that Petitioner had the propensity to commit the offenses as charged. The prosecutor stated, "He's done it before. He started off with Kristin." (Trial Tr. Vol. V, dated Sept. 14, 2001, p. 764.) The prosecutor argued that if Kristin Oliver had complained at the time of her arrest, then Sargent would not have had to go through this trial.

The prosecutor also claimed that Officer Anger, and the whole Berkley police department, wished they had done something more when the Steinbrenner complaint was filed against Smith, "after three girls" were now attacked by Petitioner. (Trial Tr. Vol. V, p. 824.) She argued that Sargent "hit the lottery" when she accused Petitioner, that Sargent should play the lottery because she picked a defendant who had three complaints in two and one half years, and Sargent "just happened to pick the right guy." (Trial Tr. Vol. V, pp. 824-825, 828.)

The prosecutor also emphasized the fact that there were no other complaints against other Berkley officers. She told the jury that they should vote not guilty only if they did not believe all three women. The prosecutor reminded the jury of Steinbrenner's statement that the "pervert," Smith, should be taken off the road. (Trial Tr. Vol. V, p. 767.) She told the jury to decide in favor of the defendant (Petitioner) only if they would be comfortable with their daughters being stopped at three o'clock in the morning by Smith.

The prosecutor also stated "this is not about going after a person who's not guilty. That would be every prosecutor's worst nightmare." (Trial Tr. Vol. V, p. 815.) She said that if the complainant had changed her story to say that there had been sexual penetration "we would believe her" and would have charged the crime differently. (Trial Tr. Vol. V, p. 822.) Although no expert witness had testified at trial, the prosecutor argued to the jury that it is common for victims in sex crimes to repress the most significant thing, in this case, digital penetration by Smith.[3]

Additionally, during the trial, there was extensive questioning of Sargent and her family as to whether they planned on suing Smith. Sargent and her family admitted to hiring an attorney, but said that the attorney had been contacted for legal advice only, and was not hired to file a civil suit against Smith. However, only two days after Smith was sentenced,

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[3] Initially, Sargent said that Smith had penetrated her vagina with his finger, but later, changed her story and said that no penetration occurred. It was Sargent's position that she no longer had a memory of that event.

that same lawyer filed a lawsuit against Smith on behalf of Sargent.

Smith was charged with three counts of criminal sexual conduct in the second degree. His trial began on September 10, 2001, and was adjourned for part of a day on September 11, 2001, because of the terrorists' attacks in New York City. On September 17, 2001, Smith was convicted of all three counts of criminal sexual conduct in the second degree.

Following his convictions, Smith was sentenced on October 24, 2001. Smith, through counsel, filed a first right of appeal with the Michigan Court of Appeals, raising the following claims:

I. Was the evidence of alleged similar acts of the Defendant admitted in violation of MRE 404(B) and in violation of the Defendant's right to due process of the law and his right to a fair trial pursuant to the United States Constitution?

II. Did the prosecutor's misconduct deny the Defendant a fair trial, as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution?

III. Should the trial court have granted a new trial to the Defendant when it was revealed after sentence that the Complainant and her family had intentionally misrepresented whether they planned to sue the Defendant; Was the Defendant denied his Sixth Amendment right to confront his accuser

by her false denial of her intent to sue the Defendant?

IV. Did the admission of improper, prejudicial hearsay evidence, rebuttal evidence and opinion evidence require a new trial; and denied the Defendant his right to confront his accusers and his right to a fair trial, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution?

V. Did the voir dire of the jury in this case, where there was prejudicial, pretrial publicity, fail to meet the minimum standards of *People v. Tyburski*; and deny the Defendant a right to a fair jury trial under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution?

VI. When the Defendant's search and seizure defense and consent defense was never presented to the jury, was the Defendant's due process right to present a defense consistent with the Fifth and Fourteenth Amendments of the United States Constitution violated?

VII. Did the Defendant receive ineffective assistance of counsel at his trial in violation of the Sixth Amendment of the United States Constitution?

VIII. Did the cumulative effect of the errors at the Defendant's trial deny his right to a fair trial, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution?

IX. Can the Defendant, a police officer, who engaged only in a consent search of the Complainant that was not a strip search or a body cavity search, be convicted of criminal sexual conduct; in his conviction against the great weight of the evidence, not supported by sufficient evidence, and violates due process rights of the Defendant under the Fifth and Fourteenth Amendments of the United States Constitution?

On October 7, 2003, the Michigan Court of Appeals affirmed Smith's convictions. *People v. Brent Smith*, No. 238005, 2003 WL 22301047 (Mich. Ct. App. Oct. 7, 2003) (unpublished). Smith filed a motion for rehearing, which was also denied. Smith then filed an application for leave to appeal in the Michigan Supreme Court, which was denied on August 31, *People v. Brent Smith*, 471 Mich. 870, 685 N.W.2d 672 (2004). Smith's petition for a writ of habeas corpus was filed with this Court on July 29, 2005. In the petition, Smith raises the following issues:

I. The prosecutor's misconduct denied the Petitioner a fair trial and due process of law in violation of Amendments V, VI, and XIV of the United States Constitution.

II. The Petitioner received ineffective assistance of counsel at his trial in violation of amendment VI of the United States Constitution; ineffective assistance also caused violations of Amendments V and VI at Petitioner's trial; the failure of either the trial court or the Court of Appeals to hold a hearing at which the Petitioner could present his claims of ineffective assistance violated the Petitioner's due process rights.

III. The Petitioner, a police officer, who engaged only in a consent search of the Complainant that was not a strip search or a body cavity search, is not guilty of criminal sexual conduct; his conviction is against the great weight of the evidence, not supported by sufficient evidence, and violated the due process rights of the Petitioner under Amendments V and XIV of the United States Constitution.

IV. The admission of improper, prejudicial hearsay evidence denied the Petitioner his right to confront his accusers, in violation of Amendment VI of the United States Constitution.

V. The cumulative effect of the errors at the Petitioner's trial denied his right to due process of the law and a fair trial, as guaranteed by Amendments V, VI, and XIV of the United States Constitution.

II.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) governs habeas corpus review of state court decisions. 28 U.S.C. § 2254(d) states in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented at the State court proceedings.

Under the "contrary to" clause of § 2254(d)(1), a federal court may grant a writ of habeas corpus if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decides a case differently than the Supreme Court has decided an issue on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). Under the "unreasonable application" clause of § 2254(d)(1), a federal court may grant habeas relief if the state court identifies the correct governing legal principle from the Supreme Court's decisions, but unreasonably applies that

principle to the facts. *Id.* at 407-08. Relief is also available if the state court decision unreasonably extends or unreasonably refuses to extend a legal principle from Supreme Court precedent to a new context. *Id.* at 407; *Arnett v. Jackson*, 393 F.3d 681, 686 (6th Cir. 2005). The proper inquiry for the "unreasonable application" analysis is whether the state court decision was "objectively unreasonable." *Williams*, *supra* at 407; *Lordi v. Ishee*, 384 F.3d 189, 195 (6th Cir. 2004).

A.

Smith first claims that he is entitled to habeas relief due to four alleged instances of prosecutorial misconduct involving: (1) improper use of the similar-acts evidence at trial; (2) improper statements of personal belief of the Petitioner's guilt; (3) arguing evidence not of record; and (4) personally attacking defense counsel. However, Smith's primary prosecutorial misconduct claim is that he was deprived of his constitutional right to a fair trial by the prosecutor's extensive use of the 404(b) witnesses' testimony as character evidence to prove his propensity to commit the alleged criminal sexual conduct in this case. The Michigan Court of Appeals, the last court to issue a reasoned decision in this case, rejected prosecutorial misconduct claims 1, 3, and 4, and found claim 2–improper statements of personal belief of the Petitioner's guilt–made during the prosecutor's rebuttal argument–were improper but curable by an objection and instruction to the jury. *Smith*, No. 238005, 2003 WL 22301047, slip op. at 9-11.

To prevail on a claim of prosecutorial misconduct, a habeas petitioner must demonstrate that the prosecutor's remarks or conduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). When addressing claims of prosecutorial misconduct, the court must first determine whether the challenged statements were indeed improper. *See United States v. Francis*, 170 F.3d 546, 549 (6th Cir. 1999). "[T]he touchstone of due process analysis . . . is the fairness of the trial, not the culpability of the prosecutor." *Serra v. Michigan Dep't of Corr.*, 4 F.3d 1348, 1355 (6th Cir. 1993) (quoting *Smith v. Phillips*, 455 U.S. 209, 219 (1982)). Prosecutorial misconduct must be so egregious as to deny a petitioner a fundamentally fair trial. *Donnelly*, 416 U.S. at 643-45.

The Sixth Circuit applies a two-step approach in determining whether prosecutorial misconduct violated a criminal defendant's due process rights: (1) whether the prosecutor's conduct and remarks were improper, and if so: (2) whether the impropriety was flagrant. *Macias v. Makowski*, 291 F.3d 447, 452 (6th Cir. 2002) (citing *United States v. Carter*, 236 F.3d 777, 783 (6th Cir. 2001)). Whether prosecutorial misconduct was flagrant is decided by weighing four factors: (1) whether the conduct and remarks of the prosecutor tended to mislead the jury or prejudice the defendant; (2) whether the conduct or remarks were isolated or extensive; (3) whether the remarks [or conduct] were deliberately or accidentally made; and (4) whether the evidence against the defendant was strong." *Macias*, 291 F.3d at 452 (quoting *Carter*, 236 F.3d at 783). Whether the trial court gave cautionary instructions also factors into the calculus of

determining whether fundamental fairness was denied. *Serra*, 4 F.3d at 1356. *See also United States v. Payne*, 2 F.3d 706, 715-16 (6th Cir. 1993) (inflammatory remarks in opening and closing statements and throughout trial were not cured by cautionary instructions); *United States v. Roberts*, 986 F.2d 1026, 1031 (6th Cir. 1993) (closing argument that appeals to the community conscience was cured by instructions).

1. Procedural Default

Respondent asserts that Petitioner's prosecutorial misconduct claims are procedurally defaulted because of his failure to object to the challenged conduct at trial. Although the Michigan Court of Appeals acknowledged Petitioner's prosecutorial misconduct claims were not properly preserved for appeal, it nonetheless addressed each act that Petitioner asserted substantiated the alleged prosecutorial misconduct on the merits and concluded that Petitioner was not entitled to relief. *Smith*, No. 238005, 2003 WL 22301047, slip op. pp. 7-11.

The Sixth Circuit applies a multi-part analysis in order to determine whether procedural default precludes the federal courts from granting habeas relief. *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986). First, the court must determine (1) whether there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule; (2) whether the state courts actually enforced the state procedural sanction; and (3) whether the state procedural forfeiture is an "adequate and independent" state ground on which the state can rely to foreclose review of a federal constitutional

claim. *Id.* If the answer to those questions is yes, then the court must inquire into whether the petitioner can obtain habeas relief by demonstrating under *Wainwright v. Sykes*, 433 U.S. 72 (1977), "that there was cause for him not to follow the procedural rule and that he was actually prejudiced by the constitutional error." *Maupin*, 785 F.2d at 138.

Here, it is evident that the first test has been satisfied. As previously stated, the Michigan Court of Appeals acknowledged that the prosecutorial misconduct claims were not preserved for appeal. However, the second test, that the state courts actually enforced the state procedural sanction, has not been satisfied in light of the fact that the Michigan Court of Appeals addressed each issue substantiating Petitioner's prosecutorial misconduct claims and concluded that Petitioner's positions were without merit. It is well settled that where a state appellate court has adjudicated an issue on its merits, federal courts may consider it in a petition for habeas corpus. *Manning v. Huffman*, 269 F.3d 720, 724 (6th Cir. 2001). Therefore, the Court will address Petitioner's prosecutorial misconduct claims on the merits.

a. Improper use of similar-acts evidence by the prosecutor to show character and propensity

Petitioner asserts that he is entitled to habeas relief because of the prosecutor's improper use of the similar-acts evidence to show his propensity toward such conduct of two other women, who claimed to have been improperly searched by him after their arrest. Petitioner argues that this evidence was improperly admitted by the trial court.

Alleged trial court errors in the application of state evidentiary law are generally not cognizable as grounds for federal habeas relief. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *Serra v. Michigan Dep't of Corr.*, 4 F.3d at 1354. Only when an evidentiary ruling is "so egregious that it results in a denial of fundamental fairness," may it violate due process and warrant habeas relief. *See Bugh v. Mitchell*, 329 F.3d 496, 512 (6th Cir. 2003), *cert denied*, 540 U.S. 930 (2003). The United States Supreme Court has declined to hold that similar other acts evidence is so extremely unfair that its admission violates fundamental conceptions of justice.

However, the Supreme Court has recognized, in the context of Fed.R.Evid. 404(a), the dangerousness of evidence of alleged similar conduct: character evidence "weigh[s] too much with the jury and . . . overpersuade[s] them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." *Michelson v. United States*, 335 U.S. 469, 476 (1948); *See also Old Chief v. United States*, 519 U.S. 172 (1997) (holding that where a felony is a predicate element of an offense, informing the jury that the predicate felony is a conviction for the same offense that is being tried is more prejudicial than probative).

Here, the prosecution used the similar-acts evidence to demonstrate that Smith had done it before, so, he must have done it this time, and, he would likely do it again.

"A fundamental rule of evidence is that a defendant's 'bad character' cannot be used to argue that the defendant committed the crime for which he

is being tried, or had a propensity to commit that crime." *Washington v. Hofbauer*, 228 F.3d 689, 699 (6th Cir. 2000). "[A]nimated recitation of . . . character evidence during closing arguments [is] plainly improper." *Id.* at 700.

In this case, during her closing argument, the prosecutor told the jury: "He's done it before–He started off with Kristin [Oliver]." She continued to argue that Oliver filed a lawsuit when she found out "other women had to go through what she went through." It was the prosecutor's argument that if Oliver had complained at the time of her arrest, then Sargent would not have had to through her trial, thereby implying that Smith would have been convicted and taken off road patrol.

In rebuttal, the prosecutor argued that Sergeant Anger, and the whole Berkley police department, probably wished that they had done something more. She continued to argue that Sargent had "hit the lottery" when she accused Smith, and that she should play the lottery because she picked a defendant who had three complaints in two and one half years.[4] The prosecutor told the jury that there were no other complaints against any other Berkley police officers. She argued to the jury that they should decide in favor of the defendant [Petitioner] only if they would be comfortable with their daughters being stopped at three o'clock in the morning by him.

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[4] It should be noted that, prior to trial, there were several articles in the Detroit Free Press, discussing the Sargent incident.

The Sixth Circuit, in *Gall v. Parker*, 231 F.3d 265 (6th Cir. 2000) and *Bates v. Bell*, 402 F.3d 635 (2005), set aside the death sentences of prisoners in Kentucky and Tennessee, because the prosecutors made appeals to the jury to sentence those defendants to death so that they would not kill again. In those cases, the Sixth Circuit held that the prosecutors comments in closing arguments in both cases were riddled with wildly inappropriate and inflammatory remarks in violation of what the Sixth Circuit has described as "the cardinal rule that a prosecutor cannot make statements 'calculated to incite the passions and prejudices of the jurors.'" *Bates*, 402 F.3d. at 642 (citing *Gall*, 231 F.3d at 315). Inflammatory remarks are improper because they "invoke emotions which may cloud the jury's determination of [the defendant's] guilt." *Martin v. Parker*, 11 F.3d 613, 616 (6th Cir. 1993) (citing *Payne*, 2 F.3d at 716).

Against that backdrop, this Court finds that the prosecutor's closing and rebuttal arguments were inappropriate and inflammatory; the prosecutor did appeal to the fears of individual jurors and to emotion. That conduct was clearly improper, and is an unreasonable application of, or contrary to, clearly established Supreme Court precedent.

b. Improper statements of the prosecutor's personal belief of the Petitioner's guilt

Petitioner alleges that the prosecutor's conduct in this case was intended to mislead the jury and attack his character. He contends that her conduct throughout the trial and during her closing and rebuttal arguments was deliberate and not accidental. Petitioner argues that the prosecutor vouched for the

credibility of the Complainant. In her rebuttal argument, the prosecutor stated, "[t]his is not going after a person who's not guilty. That would be every prosecutor's worst nightmare." The prosecutor also argued in rebuttal that if the Complainant had changed her story to say that there had been sexual penetration "we would believe her" and would have charged the crime differently. Petitioner contends that such conduct by the prosecutor was an appeal to the civic duty of the jury. In her closing argument, the prosecutor said:

> You all took an oath to return a fair and just verdict. Coming back with a not guilty, you'd have to look at Shannon Sargent and say, "I don't believe you." And Kristin Oliver, "I don't believe you." And Corrine, "I don't believe you." You have to tell the Sheriff's Department, the Oakland County Sheriff's Department, "You know what? I'd be okay with having my daughter stopped by him at three in the morning."
>
> I ask you return the right verdict, and that's guilty as charged on all three counts.

(Trial Tr. Vol. V, p. 828.)

Generally, a prosecutor cannot make statements "calculated to incite the passions and prejudices of the jurors." *United States v. Solivan*, 937 F.2d 1146, 1151 (6th Cir. 1991). In cases of sexual abuse allegations, which turn on the credibility of witnesses, courts must adhere strictly to the rules of evidence in order to insure a fair trial. The Sixth Circuit stated, in *Martin*, 11 F.3d at 616-617, "[i]n a close credibility contest such

as this, with horrible acts alleged but scant hard evidence for a jury to weigh, a prosecutor must be doubly careful to stay within the bounds of proper conduct." Moreover, in *Byrd v. Collins*, 209 F.3d 486 (6th Cir. 2000), the Sixth Circuit stated, "it is improper for a prosecuting attorney in a criminal case to state his personal opinion concerning the credibility of witnesses or the guilt of a defendant." *Id.* at 537.

In this case, the Michigan Court of Appeals concluded that the prosecutor made an improper civic duty argument, but nonetheless found that the her arguments as such did not require reversal, because they could have been cured by an instruction, and defense counsel's failure to object did not give the trial court an opportunity for an instruction. It also found that defense counsel's failure to object was acceptable trial strategy. The state appellate court stated:

> This was an improper appeal to civic duty and, arguably, was an improper request that the jury sympathize with the victim/complainant. Further, the remarks were made in rebuttal, to which defense counsel did not have opportunity to respond.
>
> * * *
>
> We conclude, however, that any prejudicial effect could have been cured by an appropriate instruction, *Watson*, *supra*, and we are satisfied that the jury did not convict based on the improper argument.

Smith, No. 238005, 2003 WL 22301047, slip op. at 10.

This Court disagrees with the Michigan Court of Appeals's analysis of the prosecutor's comments. Rather, this Court finds that, again and again, the prosecutor explicitly expressed her personal opinion. To be certain, a prosecutor can argue the record, highlight the inconsistencies or inadequacies of the defense, and forcefully assert reasonable inferences from the evidence. However, prosecutors cannot put forth their opinions as to credibility of a witness or the guilt of a defendant. "[T]he prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *United States v. Young*, 470 U.S. 1, 18-19 (1985).

c. Arguing evidence not of record

Petitioner also claims that the prosecutor argued facts to the jury that were never admitted into evidence. Asserting facts that were never admitted into evidence may mislead a jury in a prejudicial way. *Washington v. Hofbauer*, 228 F.3d at 700 (citing *Berger v. United States*, 295 U.S. 78, 84 (1935). "This is particularly true when a prosecutor misrepresents evidence because a jury generally had confidence that a prosecuting attorney is faithfully observing his obligation as a representative of a sovereignty." *Berger*, 295 U.S. at 88.

Against that backdrop, it was improper for the prosecutor to take on the mantle of an expert witness and opine to the jury that it is common for victims of sex crimes to repress the most significant abuse. (Sargent had originally claimed that Smith had penetrated her with his finger, but later, at the time of the trial, she said that she had no memory of that

anymore. [Trial Tr. pp. 821-822]). The prosecutor argued in rebuttal:

> Also, he talks about the word "penetration." You know why Shannon was so upset that night? She felt her vagina had been penetrated with a finger. She gave details about her vagina. She said she felt it, she sensed it. She wouldn't have written it if it wasn't true. Now, he's not charged with that because she doesn't remember that anymore. It would be a whole different type of sexual assault if we were charging him with penetrating it. It would be a first degree or a third degree. It wouldn't be the ones we have here. He's not being charged with that 'cause she's being truthful. Do you know how easy it would have been for her to take the stand last March, the first time we came to court in this case, and for her to say, "Yeah. That's when he penetrated me. That's when his finger went up halfway inside me," and continue to say that over and over and over again? Look at the attacks that they wouldn't have been able to have on her for that one. But she's honest and she said, "Yes, I swear to, I swear to tell the truth," and she said, "I just don't remember that anymore. I'm blocking it." She is in therapy. They're going to hold it against her if she is in therapy, but, for some reason, Kristin is not in therapy, and you should hold that against Kristin 'cause she's not in therapy, but Shannon is in therapy, and you've got to hold that against Shannon? That doesn't make any sense. Shannon had blocked it. She testified, "I just don't feel it anymore, I just don't sense it anymore." That makes sense. Even Mr. Correll

> said, "People do repress things." You know, but he says it's common and, you know, kids remember it later. How about it's common in sexual assault victims to repress the most significant thing that happened here, the worse thing? You don't want to remember that. How about that?

(Trial Tr. pp. 821-822.) The Michigan Court of Appeals found that the prosecutor's remarks were in response to the defense theory of fabrication and that any prejudicial effect could have been cured by an appropriate instruction. *Smith*, No. 238005, 2003 WL 22301047, slip op. at 10. This Court disagrees.

No expert witness ever testified for the prosecution at the trial that "it's common in sexual abuse victims to repress the most significant thing that happened here, the worse thing," penetration. The prosecutor, acting as her own expert witness, misrepresented Sargent's trial testimony – that she did not remember petitioner having penetrated her vagina – as evidence that digital penetration had in fact occurred. Without the prosecutor's unsupported representation to the jury that sexual assault victims commonly repress their memory of the worst event of a sexual assault, the assertion that a sexual penetration must have taken place *because* Sargent forgot the event would make little sense. As a result of the prosecutor's misrepresentation of the evidence, the jury could likely conclude that, because petitioner penetrated Sargent, it followed that petitioner must have committed the lesser crimes for which he was actually charged. The prosecutor bolstered her assertion that Sargent's lack of memory supported a finding that a sexual penetration had occurred by arguing, without

supporting evidence, that Sargent had been to several therapists. The court finds that the prosecutor referred to evidence not in the record for the purpose of enhancing Sargent's credibility in the eyes of the jury. Such bolstering is improper. *United States v. Francis*, 170 F.3d 546, 551 (6th Cir. 1999) (stating that improper "bolstering occurs when the prosecutor implies that the witness's testimony is corroborated evidence known to the government but not to the jury"). The court finds that the prosecutor's boosting of Sargent's credibility based on facts not in evidence constituted clear misconduct.

Here, the Court finds that the prosecution did more than merely inform the jury that Sargent "must have" stated that penetration occurred at some point, or that she did not recant her story, but because of the incident, she was experiencing "repressed" memory. The prosecutor also stated that because Kristin Oliver found out about the other women who had made complaints about Smith, she filed a lawsuit, and that Sargent had been to several therapists. However, there was in fact no evidence to support any of those contentions. Hence, the Court finds that the prosecutor's boosting of Sargent's credibility based on facts not in evidence constituted clear misconduct.

d. Personally attacking defense counsel

Petitioner next claims that the prosecutor made a direct appeal to the emotions of the jury by emphasizing, one by one, that each one of the women cried when defense counsel's cross examined them. She then engaged in a personal attack on defense counsel, when she also accused him of having made Sargent cry during her cross-examination. The Court

also finds that the prosecutor's conduct in this situation was improper. It is plainly improper for a prosecutor to level a personal attack against opposing counsel. *Young*, 470 U.S. at 9 (noting an attorney "must not be permitted to make unfounded and inflammatory attacks on the opposing advocate"); *Carter*, 236 F.3d at 785 ("[I]t is improper for counsel to make personal attacks on an opposing advocate."). If permitted, such conduct by the prosecutor calls the fairness of the trial into question.

For the foregoing reasons, the Court finds that the prosecutor's conduct was improper.

B.

Having determined that the prosecutor's conduct was improper, the Court now considers whether the misconduct was so flagrant as to warrant habeas relief for Petitioner.

First, the remarks made by the prosecutor almost certainly prejudiced Petitioner. The jury was told that they would basically be accomplices to the crime unless they convicted him. The prosecutor made it a theme of her summation that the jury's failure to convict Smith would be akin to ordering the sexual abuse of Smith's next victim. Voting not guilty for Smith meant that the juror's daughters would be in jeopardy if they were stopped by Smith in the wee hours of the morning. That type of appeal to fear and emotion clearly poisoned the trial.

Second, the prosecutor's improper conduct was not isolated to one comment or one section of the argument. More importantly, the prosecutor laced her

closing argument with personal opinion and undignified and unprofessional appeals to fear. "Standing alone, a prosecutor's comments upon summation can 'so infect [a] trial with unfairness as to make the resulting conviction a denial of due process'" *See Jenkins v. Artuz*, 294 F.3d 284, 294 (2d Cir. 2002).

Third and most regrettably, the misconduct was plainly deliberate. The Court here is not confronted with simply an off-handed remark in a heated trial. Rather, the prosecutor in this case opted to select inappropriate arguments and use them repeatedly during summation.

If a habeas court is in "grave doubt" as to the harmlessness of an error, the habeas petitioner must prevail. *See O'Neal v. McAninch*, 513 U.S. 432, 436 (1995). The Court finds that the prosecutor's improper argument clearly prejudiced Smith. The prosecutor's unnecessary and intolerable conduct injected such vitriol into the proceedings, as to question the fairness of the trial. Petitioner is therefore entitled to habeas relief on his prosecutorial misconduct claims.

C.

The Court must now assess whether defense counsel's failure to object to the prosecutor's misconduct violated *Strickland v. Washington*, 466 U.S. 668 (1984).

An essential ingredient of the Sixth Amendment right to counsel is that counsel provide constitutionally effective assistance. *See Powell v. Alabama*, 287 U.S. 45, 57 (1932). To establish that his counsel was ineffective, Petitioner must prove that (1) "counsel's

performance was deficient" and (2) "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. A strong presumption exists that counsel afforded the defendant reasonable professional assistance. *Id.* at 689. To satisfy the second prong of the *Strickland* test, a petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Therefore, "an ineffective-assistance-of-counsel claim cannot survive so long as the decisions of a defendant's trial counsel were reasonable, even if mistaken." *Moss v. Hofbauer*, 286 F.3d 851, 859 (6th Cir. 2002).

In this case, the Court finds that the Michigan Court of Appeals' application of *Strickland* was not simply incorrect, but was objectively unreasonable, meeting even the high threshold required by the AEDPA. The prosecution's tactics and challenged statements amounted to unfair and prejudicial misconduct plainly meriting an objection and curative instruction. Yet, defense counsel sat in silence. At the most pivotal moments, this Court concludes, his silence could not have been part of reasonable trial strategy. The Michigan Court of Appeals' assessment of the events was inadequate, failing to appreciate or even consider the critical issues involved. Throughout its opinion, the state appellate court found that defense counsel's actions in this case were simply his trial strategies that "[were] not below an objective standard of reasonableness" and that the outcome "would not have been affected had the objections been

made." *Smith*, No. 238005, 2003 WL 22301047, slip op. at 15.

This Court finds that the state appellate court failed to understand the concept of strategy and unreasonably applied that concept. "[T]he label 'strategy' is not a blanket justification for conduct which otherwise amounts to ineffective assistance of counsel." *Washington v. Hofbauer*, 228 F.3d at 704 (citing *Lovett v. Foltz*, No. 88-1682, 1989 WL 101522 (6th Cir. Sept. 5, 1989) (unpublished opinion). Even with that articulated strategy, it does not explain why defense counsel did not object to the prosecution's most egregious character attacks during her closing and rebuttal arguments. The risk of prejudice inherent in that strategy would have made a reasonably competent attorney doubly cautious about the potential misuse of that evidence.

The Court also finds that counsel's failure to object to the prosecutor impeaching Petitioner on why he did not give his side of the story to the police demonstrated ineffectiveness. The United States Supreme Court has held that if a police officer is compelled by his own department to give a statement, that statement cannot be used by the prosecution against him. *Garrity v. New Jersey*, 385 U.S. 493 (1967). The impeachment of Petitioner with his silence therefore was a violation of his rights and, because defense counsel did not object, unfairness was interjected into Petitioner's trial.

Defense counsel also failed to object to the admission of prior consistent statements of the Complainant from other witnesses–it is error to admit corroborating hearsay in order to buttress the credibility of a complainant. *Tome v. United States*,

513 U.S. 150 (1995) (prior consistent statements of an alleged victim of child abuse were not admissible).

In short, defense counsel's failure to object to the above fell below an objective standard of reasonableness and constituted an omission outside the wide range of professionally competent assistance. Petitioner has demonstrated to this Court that the failure to object was based on simple neglect or incompetence, and not on sound trial strategy. The Court finds that the state appellate court's application of *Strickland* was objectively unreasonable.

In addition to finding constitutionally defective performance, the Court also finds that the failure to object to the various statements prejudiced Smith's case. Cases of criminal sexual involve a credibility contest, as there is usually no evidence in the record indicating a defendant's guilt outside of a complainant's allegations. Thus, outside of the substance of Smith's and Sargent's testimonies, nothing was more important to the case than the indicia that one story was more believable than the other. In such a case, the prosecutor's misconduct very likely tipped the scales, and the defense counsel's failure to object to the ongoing misconduct and request curative instructions most likely affected the outcome of the trial.

III.

This Court finds that the state court's decisions in this case were contrary to, or an unreasonable application of, clearly established Supreme Court precedent, and finds that Smith has established that he is presently in custody in violation of the

Constitution or laws of the United States. On that basis, this Court conditionally grants Smith's petition for a writ of habeas corpus.

Because the Court has concluded that Petitioner is entitled to habeas relief on his prosecutorial and ineffective assistance of counsel claims, the Court considers it unnecessary to review Petitioner's other claims and declines to do so. *See Haynes v. Burke*, 115 F. Supp.2d 813, 819-820 (E.D.Mich. 2000); *Berrier v. Egeler*, 428 F. Supp. 750, 754 (E.D.Mich. 1976).

IT IS HEREBY ORDERED:

That Petitioner's Application for Writ of Habeas Corpus is conditionally **GRANTED**. Unless the State takes action to afford Petitioner a new trial within ninety (90) days of the date of this Order, he may apply for a writ ordering Respondent to release him from custody forthwith.

Dated: September 25, 2007

S/George Caram Steeh
GEORGE CARAM STEEH
UNITED STATES DISTRICT JUDGE

* * *

[Certificate of Service omitted in printing of this appendix]

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

Case Number: 05-CV-72971
Honorable George Caram Steeh

[Filed September 25, 2007]

BRENT SMITH,	)
	)
Petitioner,	)
	)
v.	)
	)
KURT JONES,	)
	)
Respondent.	)
	)

JUDGMENT

IT IS ORDERED AND ADJUDGED that pursuant to this Court's Opinion and Order of even date, petitioner Brent Smith's petition for a writ of habeas corpus is conditionally **GRANTED**. Unless the State takes action to afford Petitioner a new trial within ninety (90) days of the date of this Order, he may apply for a writ ordering Respondent to release him from custody forthwith.

DAVID J. WEAVER
CLERK OF THE COURT

BY: s/Josephine Chaffee
DEPUTY COURT CLERK

Dated: September 25, 2007

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 07-2275

[Filed June 26, 2009]

BRENT SMITH,	)
	)
Petitioner-Appellee,	)
	)
v.	)
	)
KURT JONES,	)
	)
Respondent-Appellant.	)
	)

ORDER

BEFORE: BOGGS, Chief Judge; COLE and COOK, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green
Clerk

APPENDIX E

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
October 7, 2003

No. 238005
Oakland Circuit Court
LC No. 2001-177388-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRENT ALLEN SMITH,

Defendant-Appellant.

Before: Bandstra, P.J., and White and Donofrio, JJ.

PER CURIAM.

A jury convicted defendant of three counts of criminal sexual conduct (CSC), 2d-degree, MCL 750.520c. He was sentenced to three concurrent terms of four to fifteen years' imprisonment. He appeals as of right the judgment and sentence, and we affirm.

I

Defendant was a police officer with the City of Berkley from June 1997 until approximately 2001. The instant charges arose from events in the early morning hours of December 23, 2000, when defendant, who worked the midnight shift, was on duty and patrolling. The complainant, 19 year-old Shannon Sargent, testified that at around 1:30 a.m. that morning, defendant approached the vehicle in which she and her boyfriend were "making out," which was parked behind a bar in Berkley. Sargent showed defendant a driver's license that was not her own, belonging to a woman who was of legal drinking age. Sargent testified that defendant asked her to step out of the car and get in the police car, asked if he could search her and did so, and later asked if he could do a second search while she was seated in the back seat of the patrol car, during which he felt her breast, inner thighs, vaginal area, and buttocks, while his hand was underneath her clothes. She testified she was crying and hysterical. Her boyfriend at the time, Peter Marinelli, corroborated that testimony, and said she had told him that defendant had put his finger inside her. Defendant drove Marinelli and Sargent to the local Denny's and dropped them off. The manager of Denny's testified that he saw Marinelli and Sargent and that Sargent was crying and upset. Sargent's mother and Sargent testified to the adverse effects and mental anguish the incident caused Sargent, including her seeking therapy, her subsequent inability to drive more than short distances and her fear of police officers.

The trial court permitted the prosecution to present similar acts evidence through two witnesses, Kristin

Oliver and Corinne Steinbrenner, both of whom testified that defendant had inappropriately touched them during searches following traffic stops in 1998. Oliver, a 33 year-old, testified defendant stopped her after she rolled through several Michigan turns, around 2:30 a.m. on May 3, 1998. She failed a field sobriety test. Defendant patted her down before placing her in the police car and taking her to the station. At the station, defendant told her he had to search her again and put his hands inside her bra and tried to search inside her pants. He observed her go to the bathroom through a window and said he had to search her again, moving his hand up her inner thigh, cupping her vagina, and then moving down the other thigh. Oliver pleaded guilty of driving while impaired. In May 2001, she brought a federal suit against the Berkley police department arising out of the May 1998 incident.

Corrinne Steinbrenner testified that on June 21, 1998, when she was 16 years old, defendant pulled her over at around 1:30 a.m. while she was driving a friend's car, without a license. She lied to defendant about having a license. Defendant searched her, then searched her friend and sent him home in his car. After that, he searched her again, groping her chest over her clothing. Defendant took her to the police station, under arrest. Several days later, she told her mother about the incident, and the two filed a complaint against defendant at the station.

Defense counsel vigorously cross-examined and impeached both of the similar acts witnesses.

The defense's theory was that defendant committed no wrongdoing. Defendant adamantly denied

conducting a second search of Sargent, and maintained throughout trial that his investigation and search of Sargent were "routine" and permissible in scope. Defense counsel argued that the complainant and the similar acts witnesses were not credible, that there was no system, scheme or plan on his part, and that his intent was not in issue because he denied committing the acts charged.

The jury convicted defendant as charged. The trial court denied defendant's motions for new trial and for directed verdict of acquittal. This appeal ensued.

II

Defendant asserts that the similar acts were not sufficiently similar to show a common plan, system, or scheme and the evidence was thus inadmissible under MRE 404(b).

Defendant objected below to admission of the similar acts evidence. This Court reviews the trial court's admission of similar acts evidence under MRE 404(b) for an abuse of discretion. *People v Sabin (After Remand),* 463 Mich 43, 60; 614 NW2d 888 (2000). To be admissible under MRE 404(b), similar acts evidence 1) must be offered for a proper (i.e., non-propensity) purpose, 2) must be relevant, and 3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v Starr,* 457 Mich 490, 496; 577 NW2d 673 (1998). If evidence of similar acts is admitted for a limited purpose, a prosecutor deprives the defendant of a fair trial if she argues that the jury should consider the evidence as substantive evidence of the defendant's guilt. *People v Quinn,* 194 Mich App 250, 253; 486 NW2d 139 (1992).

A trial court may grant a new trial "on any ground that would support appellate reversal of the defendant's conviction or if the court believes that the verdict has resulted in a miscarriage of justice." *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000). A trial court's denial of a motion for new trial is reviewed for an abuse of discretion, while its factual findings are reviewed for clear error. *Id.*

A

MRE 404(b) provides:

> (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

In *Sabin (After Remand)*, 463 Mich at 63-64, the Supreme Court noted:

> Today, we clarify that evidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system. Logical relevance is not

> limited to circumstances in which the charged and uncharged acts are part of a single continuing conception or plot.
>
> General similarity between the charged and uncharged acts does not, however, by itself, establish a plan, scheme, or system used to commit the acts. [*Sabin, supra* at 63-64, citations omitted.]

The standard for admission of similar acts evidence to establish a common plan, scheme, or system was revisited in *People v Hine,* 467 Mich 242, 251-252; 650 NW2d 659 (2002). In *Hine, supra,* the defendant was charged with murder and first-degree child abuse after his girlfriend's daughter, a 2 ½ year old child that had been in his care, died of multiple blunt force injuries, and an autopsy revealed internal injuries of varying ages. Following an evidentiary hearing at which proposed similar acts witnesses testified, the trial court permitted three former girlfriends of the defendant, including the child's mother, to testify. One testified that the defendant "grabbed her arms, put his hands in her mouth, and stretched her lips," and threatened her; another former girlfriend testified that the defendant assaulted her at least once a week, head-butted her, picked her up and threw her down, and grabbed and shoved her; the mother of the deceased child testified that the defendant pinned her arms with his knees, pushed and shoved her, kneed her in the mouth once, head-butted her, and put his fingers inside her mouth and forcefully pulled. This Court reversed the defendant's convictions, concluding that the other acts evidence "made none of the facts in dispute at defendant's trial more or less probable," and that "substantial dissimilarities existed between the

assaults on the other acts witnesses and the injuries sustained by the victim." The Supreme Court reversed and remanded for reconsideration in light of *People v Sabin (After Remand), supra,* 463 Mich 43. On remand, this Court again reversed the defendant's convictions, concluding that "the other acts evidence was used to prove the 'very act' that was the object of proof," that a higher degree of similarity was required, and that there was "nothing, within the universe of violent assaults" particularly unusual or distinctive in the conduct of the defendant. *Hine, supra* at 249-250. The Supreme Court reversed, noting:

> In *Sabin,* we held that evidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system. For other acts evidence to be admissible there must be such a concurrence of common features that the uncharged and charged acts are naturally explained as individual manifestations of a general plan, *Sabin, supra* at 64-65. *Sabin* involved the use of other acts evidence to prove that the charged act occurred. We recognized that the degree of similarity between the uncharged and charged conduct required as a threshold for admissibility in such a case was higher than that needed to prove intent, but not as great as that needed to prove identity. *Id.* at 65.
>
> In this case, the Court of Appeals imposed a standard of a high degree of similarity between the other acts and the charged acts, apparently

because it believed that the evidence presented to the trial court did not demonstrate any unlawful conduct. The Court of Appeals was mistaken. The testimony and offers of proof at the evidentiary hearing suggested that Caitlan had died from multiple, nonaccidental, blunt force injuries, and that her death was a homicide.

Specifically, the evidence established that the "fish-hook" assaults on the defendant's former girlfriends were similar to the method or system that could have caused the fingernail marks on Caitlan's right cheek. Further, one of the other acts witnesses described the forceful and hurtful "poking" inflicted upon her by the defendant. The forensic pathologist testified that Caitlan had fifteen to twenty circular bruises on her abdomen, the largest of which measured about one inch. The expert on child abuse testified that these injuries were typical of injuries received when a child has been poked, and that accidental injuries in that area of a child's body were completely atypical. Thus, contrary to the observations of the Court of Appeals, there were both injuries distinctive from ordinary assaults, and similarities between the other acts (uncharged conduct) and injuries to the child (charged conduct). As we stated in *Sabin,* distinctive and unusual features are not required to establish the existence of a common design or plan. The evidence of uncharged acts need only support the inference that the defendant employed the common plan in committing the charged offense. *Sabin, supra* at 65-66.

> The trial court did not abuse its discretion in determining that the assaults by the defendant on his former girlfriends and the charged offenses regarding Caitlan shared sufficient common features to permit the inference of a plan, scheme, or system. The charged and uncharged acts contained common features beyond similarity as mere assaults. [*Hine, supra* at 251-253.]

B

The prosecution's pretrial motion argued the similar acts evidence was admissible to show intent; absence of mistake or accident; common plan, scheme or system; and to rebut that complainant fabricated the incident. In support of the motion, the prosecution submitted: photographs of the complainant, Shannon Sargent, and of Kristin Oliver (formerly Goodwin), the investigative police report of the police interview of Oliver in January 2001, Oliver's signed statement to the police regarding the incident, Corinne Steinbrenner's (formerly Pokryfke) signed statement to the police dated July 19, 1998, an investigative police report dated August 5, 1998 of the incident involving Steinbrenner, the investigative police report of a taped phone interview of Steinbrenner (who lived in Pennsylvania at the time) in January 2001.

Defendant argued that his intent and absence of mistake or accident were not in issue because the complainant alleged the sexual assault occurred only during a second search and defendant denied that any second search ever occurred. Defendant argued that

the similar acts evidence did not support that any scheme existed.[1]

The trial court concluded that the 404(b) evidence was relevant to showing a plan, scheme or system and also relevant to rebut defendant's claim of fabrication.

Defendant's motion for new trial argued there was insufficient similarity between the charged and uncharged conduct. Defendant argued that dissimilarities among the complainant and similar acts witnesses included: types of stop (traffic v suspicious person), place where the searches occurred (on scene v station house), types of searches that occurred (under clothing v over clothing), and charges filed (none v impaired driving).

Despite the dissimilarities between the charged and uncharged conduct, we conclude that under *Hine, supra,* and *Sabin (After Remand), supra,* the uncharged conduct was sufficiently similar to the charged offenses to support the inference that Smith used a common system or plan in committing the charged offenses. While on-duty and patrolling on the midnight shift, defendant detained attractive women in the early morning hours, separated them from their companions, searched each woman, and abused his

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[1] In the alternative, defendant argued that if the trial court admitted the 404(b) testimony, he should be permitted to introduce certain employment records to establish his good character, including that he had been voted the 1998 Berkley Officer of the Year, and had made approximately 62 OUIL arrests, 44 DWLS arrests, written 1213 violations, and investigated over 100 suspicious persons. The court admitted defendant's employment records.

authority to conduct lawful searches by subjecting them to inappropriate sexual touching under the guise of conducting a subsequent search.

The trial court did not abuse its discretion in admitting the similar acts evidence to show system, scheme or plan and did not abuse its discretion in denying defendant's motion for new trial on this basis. *Hine, supra.*

C

Defendant contends that this Court should adopt the "federal test" for admission of similar acts evidence set forth in *United States v Gessa,* 971 F2d 1257 (CA 6, 1992) (en banc),[2] which, according to defendant, requires a court to find that the other acts occurred before the evidence may be admitted.[3]

We agree with the prosecution that the Michigan standard is as set forth in *People v VanderVliet,* 444

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[2] The holding of *Gessa, supra,* was summarized recently in *United States v Price,* 329 F3d 903 (CA 6, 2003), petition for cert filed 7/29/03:

> [Under *Gessa*] a district court must first determine whether there is sufficient evidence that the other act occurred. Next, the district court must determine whether the offering party is attempting to prove the other act for a purpose other than showing character, such as to show intent or identity. [*Gessa,*] at 1262. Finally, the district court must balance the probative value of the evidence against the danger of unfair prejudice. *Id.*

[3] Defendant did not raise this issue below until his motion for new trial.

Mich 52, 68-69 n 20; 508 NW2d 114 (1993), and that the evidence met that standard in this case. *VanderVliet* states in pertinent part:

> The Court [in *Huddleston v United States*, 485 US 681; 108 S Ct 1496; 99 L Ed 2d 771 (1988),] rejected the proposition that Rule 104(a) mandated a preliminary finding by the trial judge that the other act occurred.
>
> > [I]t not only superimposes a level of judicial oversight that is nowhere apparent from the language of that provision, but it is simply inconsistent with the legislative history behind Rule 404(b). The Advisory Committee specifically declined to offer any "mechanical solution" to the admission of evidence under 404(b). Advisory Committee's Notes on Fed Rule Evid 404(b), 28 USC App, p 691. Rather, the Committee indicated that the trial court should assess such evidence under the usual rules for admissibility: "The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availibility [sic] of other means of proof and other factors appropriate for making decisions of this kind under Rule 403." *Ibid.*; see also S Rep No. 93-1277, p 25 (1974) ("[I]t is anticipated that with respect to permissible uses for such evidence, the trial judge may exclude it only on the basis of those considerations

set forth in Rule 403, i.e., prejudice, confusion or waste of time").

* * *

[Q]uestions of relevance conditioned on a fact are dealt with under Federal Rule of Evidence 104(b) . . . . In determining whether the Government has introduced sufficient evidence to meet Rule 104(b), the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact—here, that the televisions were stolen— by a preponderance of the evidence.

* * *

We emphasize that in assessing the sufficiency of the evidence under Rule 104(b), the trial court must consider all evidence presented to the jury. "[I]ndividual pieces of evidence, insufficient in themselves to prove a point, may in cumulation, prove it. The sum of an evidentiary presentation may well be greater than its constituent parts." *Bourjaily v United States,* 483 US 171, 179-180 [107 S Ct 2775; 97 L Ed 2d 144] (1987). [*Huddleston, supra* at 688-691.]

[*VanderVliet,* 444 Mich at 68-69 n 20.]

Defendant's reply brief argues that if *VanderVliet, supra,* applies, this Court must hold that the trial court erred by ruling the evidence admissible without (1) holding a hearing to hear the evidence and (2) making a finding that the acts had occurred. We disagree.

Defendant cites no authority to support that an evidentiary hearing *must* be held before a court may admit MRE 404(b) evidence. As summarized above, the prosecution submitted extensive documentary evidence in support of its 404(b) motion as to both of the similar acts witnesses' encounters with defendant, much of it consisting of police reports and interviews. From this evidence, the trial court could conclude that a reasonable jury could find the similar acts occurred by a preponderance of the evidence. *VanderVliet, supra.* Defendant's claim that a trial court *must* make a preliminary finding that the other acts occurred was rejected in *VanderVliet* in favor of the standard that the trial court examine all the evidence and decide whether the jury could reasonably find the conditional fact occurred by a preponderance of the evidence.

D

Defendant also argues that the prosecutor used the similar acts evidence to argue propensity—a forbidden purpose under MRE 404(b). Defendant challenges remarks the prosecutor elicited from one similar acts witness that, in an out-of-court statement, she called defendant a "pervert" who should be taken off the road, and from the other similar acts witness that defendant "did it again." Defendant also challenges the prosecutor's remarks in closing argument that: "He's done it before—He started off with Kristin," that

Kristin filed a lawsuit when she found out "other women had to go through what she went through," and that if Kristin had complained about defendant when she was arrested, then Shannon would not have had to go through this trial. Defendant further challenges the prosecutor's rebuttal argument that the Berkley Police Department now wished it had done something after the first complaint regarding defendant "after three girls" were attacked by defendant, and that the complainant "hit the lottery" when she accused defendant, and "just happened to pick the right guy," emphasizing that there were no complaints against other Berkley police officers.

The test of prosecutorial misconduct is whether the defendant was deprived of a fair and impartial trial. *People v Watson,* 245 Mich App 572, 586; 629 NW2d 411 (2001). Claims of prosecutorial misconduct are decided on a case-by-case basis, and the reviewing court must examine the pertinent parts of the record and evaluate a prosecutor's remarks in context. *People v Noble,* 238 Mich App 647, 660; 608 NW2d 123 (1999). The prosecutor's comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Schutte,* 240 Mich App 713, 721; 613 NW2d 370 (2000). A prosecutor may not make a statement of fact that is unsupported by the evidence, *People v Stanaway,* 446 Mich 643, 686; 521 NW2d 557 (1994), but is free to argue the evidence and all reasonable inferences arising therefrom as they relate to the prosecution's theory of the case. *Schutte, supra.* The prosecution need not use the least prejudicial evidence available to establish a fact or state the inferences in the blandest possible terms. *People v Fisher,* 449 Mich 441, 452; 537 NW2d 577 (1995).

Otherwise improper prosecutorial conduct or remarks might not require reversal if they address issues raised by defense counsel. *People v Jones,* 468 Mich 345, 353; 662 NW2d 376 (2003).

Appellate review of prosecutorial misconduct claims is precluded absent a timely and specific objection below, unless an objection would not have cured the error, or if failure to review the issue would result in a miscarriage of justice. *Stanaway, supra* at 687; *People v Callon,* 256 Mich App 312, 329; 662 NW2d 501 (2003). A miscarriage of justice will not be found if a timely instruction could have cured the prejudicial effect of the prosecutorial remarks. *Watson, supra* at 586.

Defendant did not object to any of the remarks he maintains constituted improper propensity argument, thus appellate review is foreclosed unless the prejudicial effect was so great that it could not have been cured by an appropriate instruction, or if failure to review the issue would result in a miscarriage of justice. *Stanaway, supra* at 687.

Under the circumstances that the trial court read the limiting similar acts instruction, both counsel referred at trial several times to the limited (proper) use to which the jury could put the similar acts testimony, and that the jury was instructed that counsel's remarks were not evidence, we conclude that failure to further review this issue will not result in a miscarriage of justice.

Defendant relatedly argues that his trial counsel's failure to object to the prosecutor's propensity remarks constituted ineffective assistance of counsel. However,

defendant has failed to overcome the strong presumption that trial counsel's tactics constituted sound trial strategy, *Rodgers, supra,* 248 Mich App 702, and we find it unlikely that the verdict was the result of improper argument.

E

Defendant contends that the similar acts limiting instruction allowed the jury to consider the similar acts evidence for three purposes other than the court had allowed pre-trial: that defendant had a reason to commit the crime, that defendant meant to touch the complainant, and that defendant had acted purposely, not by accident or mistake. Defendant maintains that all three were improper uses of similar acts testimony in a case charging CSC, 2d.

Unpreserved claims of instructional error are forfeited unless relief is necessary to avoid manifest injustice. *People v Carines,* 460 Mich 750, 764-765; 597 NW2d 130 (1999); MCL 768.29. Nonconstitutional unpreserved claims are reviewed for plain error. *Carines, supra* at 774. A defendant must show a plain error that affected substantial rights; a reviewing court should reverse "only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Id.*

Defendant is correct that the Court in *Sabin (After Remand),* concluded that the similar acts evidence was not relevant to show absence of mistake or motive and intent, see 463 Mich at 68-69; however, the Court held that the evidence was properly admitted to show defendant's scheme, plan or system. See also *People v*

Pesquera, 244 Mich App 305, 318-321; 625 NW2d 407 (2001), in which this Court did not reverse the defendant's conviction where the jury was instructed on both a proper purpose as well as an improper purpose.

Assuming the jury instruction was erroneous in part, reversal is not warranted where the jury was also instructed on a proper purpose for use of the similar acts evidence. *Sabin (After Remand), supra; Pesquera, supra* , and it is unlikely that the jury considered the evidence with respect to the other purposes, because the evidence did not bear on those issues, or the issues were immaterial.

III

Defendant next argues that the prosecutor's remarks appealing to civic duty, her statements of personal belief of defendant's guilt, her testifying, and her impeachment of defendant with his silence deprived defendant of a fair trial, due process, and his right to remain silent. We find no reversible error.

A prosecutor may not urge the jury to convict the defendant as part of its civic duty. *People v Bahoda,* 448 Mich 261, 282; 531 NW2d 659 (1995). A prosecutor may not comment on a defendant's silence when accused by police, but may argue that certain evidence is uncontradicted, and may contest evidence the defendant presents. *Callon, supra* at 331; *People v Launsburry,* 217 Mich App 358, 361; 551 NW2d 460 (1996). The prosecution may not vouch for a witness' credibility to the effect that he has some special knowledge that the witness is testifying truthfully, *Bahoda, supra* at 276, but may argue from the facts

that the defendant or another witness is not worthy of belief.

Since defendant did not object to the remarks challenged here, our review is for plain error that affected substantial rights. *People v Rodriguez,* 251 Mich App 10, 32; 650 NW2d 96 (2002). Reversal is warranted only when a plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings. *Schutte, supra* at 720.

As to the prosecutor's remark in her closing rebuttal that "This is not about going after a person who's not guilty. That would be every prosecutor's worst nightmare. . . ," we conclude that a timely objection and resulting instruction could have cured any prejudicial effect.

The prosecutor also stated that, although the complainant initially reported that defendant had penetrated her vagina with his finger, she later blocked it out, adding that "it's common in sexual assault victims to repress the most significant thing that happened," and "use your common sense about why she's not saying penetration. Let me tell you something. If she said this word 'penetration' under oath each time, we would believe her. . . ."

Defense counsel argued in closing argument that the complainant's "forgetting" of the alleged penetration was not believable and supported the defense theory that she fabricated the entire incident. As such, the prosecutor's remarks were in response to

defense argument, and any prejudicial effect could have been cured by an appropriate instruction.

The comments defendant challenges as improper prosecutorial comment on his silence are not. Defendant maintained that, until the instant trial, he had not had opportunity to defend himself against the charges. On cross-examination, the prosecutor asked defendant about the impression he created that he had not been able to present his side of the Sargent incident, and asked whether defendant had been aware that Sgt. Miller was investigating the Sargent incident. Defendant admitted that he was aware, and testified that he did not contact Miller or provide a written report. This did not constitute an impermissible use of defendant's silence. See *People v Allen,* 201 Mich App 98, 102-104; 505 NW2d 869 (1993) (where defendant did not claim to have told police same version of his exculpatory story on arrest, but rather, claimed that trial was his first opportunity to tell his version of the events, the case falls under exception permitting impeachment of a defendant's version of postarrest behavior.)

We agree with defendant that several of the challenged prosecutorial remarks were improper. For example, the prosecutor ended her rebuttal closing argument with:

> You all took an oath to return a fair and just verdict. Coming back with a not guilty, you'd have to look at Shannon Sargent and say, "I don't believe you." And Kristin Oliver, "I don't believe you." And Corrinne, "I don't believe you." You have to tell the Sheriff's Department, the Oakland County Sheriff's Department, "You

> know what? I'd be okay with having my daughter stopped by him at three in the morning."
>
> I ask that you return the right verdict, and that's guilty as charged on all three counts.

This was an improper appeal to civic duty and, arguably, was an improper request that the jury sympathize with the victim/complainant. Further, the remarks were made in rebuttal, to which defense counsel did not have opportunity to respond. We conclude, however, that any prejudicial effect could have been cured by an appropriate instruction, *Watson, supra,* and we are satisfied that the jury did not convict based on the improper argument.

Defendant argues the prosecutor invaded the province of the jury and violated his Sixth Amendment rights by eliciting an affirmative response from Officer Miller and defendant to the question whether they believed that criminal sexual conduct had occurred if Sargent's testimony were true. We disagree.

On re-direct examination the prosecutor asked Miller general questions about the scope of searches and pat-downs. He was not asked directly whether, if Sargent's testimony were true, it would establish criminal sexual conduct, although he expressed this opinion. As to defendant, he denied Sargent's story was true, but agreed that if it were, there would have been criminal sexual conduct. The trial court at this point intervened, however:

> *Q.* Would you agree with me that Shannon's inner thighs, bare inner thighs being

> touched, her vagina being touched, bare breasts, bottom, that's criminal sexual conduct?
>
> *A.* Absolutely.
>
> THE COURT: I have a problem. I'm going to be very blunt. The jury will be instructed as to the elements of what constitutes criminal sexual conduct. Mere touching does not necessarily constitute. Okay? Now, that's very precise.

The trial court's intervention made it clear that the court would instruct the jury regarding the elements the prosecutor had to prove to establish second-degree CSC, and that mere touching did not of necessity constitute CSC. We conclude the trial court's admonition cured any prejudicial effect Miller's or defendant's remarks may have had.

The remaining remarks defendant challenges were unobjected to and would not warrant reversal, including the prosecutor's references to the complainant and similar acts witnesses having cried on the stand (which was supported by the record).

IV

Defendant next asserts that the prosecution, the complainant, and the complainant's family misled the jury when they testified that they had not hired attorney Brian Kutinsky and that they had no plans to file a civil lawsuit, that the prosecutor reinforced this denial of the existence of a civil claim and the simultaneous denial of any interest in the outcome of

the trial when she argued in closing that the complainant had no motive to lie, and that a new trial should have been granted when, two days after defendant was sentenced, Kutinsky filed suit in federal court on complainant's behalf.

Defendant produced no evidence to support that complainant, her attorney, and the prosecutor conspired to prevent her being lawfully impeached. Further, defendant vigorously cross-examined the complainant regarding her potential filing of a civil suit. As the prosecution notes, defendant can pursue his theory of collusion in the civil suit, which the complainant filed after defendant had been sentenced in the instant case.

Defendant argues in a reply brief that he would have produced evidence of such collusion had he been granted the evidentiary hearing he requested in his motion for new trial, and that the record's failure to support his claim is thus not his fault, but the trial court's. Defendant neither cites supporting authority nor does he articulate what evidence he would have produced at such a hearing. Under these circumstances, we conclude that the trial court did not abuse its discretion in denying defendant's motion for new trial on this basis. MCR 2.611(A)(1).

V

Defendant argues he was denied a fair trial by the admission of improper, prejudicial hearsay testimony, rebuttal evidence and opinion evidence. We disagree.

A

Defense counsel objected on hearsay grounds to the testimony of complainant's then-boyfriend, Peter Marinelli, that complainant was crying hysterically and very upset when she told him she had been searched and that defendant had stuck his finger inside her. However, defense counsel withdrew the objection after the prosecutor invoked the excited utterance exception and the court admitted the testimony. Defense counsel objected to complainant's mother's testimony that on arriving home, Shannon ran into her room, she ran after her and asked her what had happened, and Shannon said she had been searched under her clothes. The objection was overruled. Defendant did not object to the complainant's testimony that she told Marinelli defendant had searched her several times and stuck his finger inside her.

MRE 803(2) provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> (2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

The two primary requirements for excited utterances is that there be a startling event, and that the resulting statement be made while under the

excitement caused by the event. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). However, "[t]he trial court's determination whether the declarant was still under the stress of the event is given wide discretion," *id.*, at 552, citing McCormick, Evidence (3d ed), § 297, p 857, and the trial court may consider all the circumstances bearing on spontaneity and lack of deliberation. *Id.* at 551-552.

We conclude that as in *Smith, supra*, it was within the trial court's discretion to conclude that the testimony fell under the excited utterance exception, given the testimony regarding the complainant's physical condition immediately after the incident. The statements arose out of a startling occasion, and witnesses that saw the complainant immediately or soon after the incident involving defendant, including Marinelli, the manager at the Denny's restaurant that defendant drove Marinelli and complainant to after the incident, and complainant's mother, testified she was very upset, shaken, and crying. *Smith, supra.* Further, complainant's mother's testimony, even if admitted in error, was cumulative to complainant's testimony that she told her mother defendant had searched her under her clothes, and the error was thus harmless.

B

Defendant challenges the prosecutor's elicitation of testimony about a crying secretary in the prosecutor's office as improperly buttressing Oliver's testimony. Defendant also argues that the prosecutor improperly used the testimony regarding the crying secretary to buttress Oliver's testimony. The trial court denied defendant's motion for new trial on this basis,

concluding that although nonverbal conduct can be hearsay under MRE 801(a)(2), the testimony about the crying secretary was not offered to prove the truth of the matter asserted, but rather, to show what officer Anger did as a result. It appears from the record that the testimony was so limited at the time of its admission.

We conclude that, read in context, the prosecutor's rebuttal argument was largely proper commentary on the evidence and reasonable inferences arising therefrom, *Schutte, supra,* and any improper argument would not have affected the outcome of the trial.

C

Defendant also argues the prosecution was improperly permitted to call the Berkley Police Chief, Bruce Henderlight, to rebut defendant's testimony that he (defendant) was not disciplined for the Steinbrenner incident. We disagree. The Chief's testimony was responsive to evidence introduced by defendant, and rebutted defendant's testimony on direct examination; thus it was properly admitted as rebuttal. *People v Figgures,* 451 Mich 390, 398-399; 547 NW2d 673 (1996) ("Rebuttal evidence is admissible to 'contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same.'")

VI

Defendant asserts that the voir dire was legally and constitutionally inadequate because the trial court and defendant's trial counsel conducted a superficial

voir dire, asking only if jurors had been exposed to publicity and, if so, had they formed an opinion.

Whether the trial court conducted a sufficiently probing voir dire to uncover potential juror bias is reviewed for an abuse of discretion. *People v Tyburski*, 445 Mich 606, 609; 518 NW2d 441 (1994). "[W]here the trial court, rather than the attorneys, conducts voir dire, the court abuses its discretion if it does not adequately question jurors regarding potential bias so that challenges for cause, or even peremptory challenges, can be intelligently exercised." *Id.*, at 619, citing *Fedorinchik v Stewart*, 289 Mich 436, 438-439; 286 NW 673 (1939).

Defendant's arguments are unsupported by the record. Defense counsel asked the court before trial whether the jurors could be asked in private if they read the September 5, 2001 article in The Oakland Press, and requested that anyone who had read the article be removed for cause because the article discussed the results of a polygraph test. The trial court asked the potential jurors whether they knew anything of this case, as it had been in the paper and other media. Several potential jurors stated they had read about it in the paper, heard it on the news, and all were then asked whether they had formed an opinion such that they could not be fair and impartial. In addition, the trial court asked specifically about the September 5 th Oakland Press article, contrary to defendant's argument. Defense counsel also questioned potential jurors regarding exposure to publicity

As the trial court's opinion and order denying defendant's motion for new trial states, of the five pool members who had read the article, all were eventually

dismissed. Defense counsel was allowed to participate in the voir dire, and both parties were able to dismiss members who had read the article. We conclude that the trial court conducted a sufficiently probing voir dire as required by *Tyburski, supra,* and did not abuse its discretion by denying defendant's motion for new trial in this regard.

VII

Defendant argues that although he denied searching the complainant in the way that she testified he did, if the jury believed her description of the search, the jury decided whether the search was criminal sexual conduct without any guidance from the court as to a police officer's right to detain, search, and the permissible scope of a search. He contends that the absence of jury instructions framing a defendant's defense constitutes a denial of due process and a fair trial.

The charges against defendant arose from defendant's second search of the complainant. No wrongdoing was alleged in connection with defendant's first search. Regarding the second search, the complainant testified that before starting it, defendant asked her whether she wanted a female officer present, and she declined, saying that he should "just get it over with." The complainant also testified that as he was conducting the second search, defendant would say what he was going to do next. However, the complainant did not testify, nor was there any testimony to support, that she agreed to a second search that included defendant placing his hands underneath her clothes and touching her inner thighs, breast, vaginal area and buttocks. Rather, the

complainant testified that she believed she could not say no to a police officer; and both she and her boyfriend testified that she was extremely upset and crying immediately after the second "search." Under the circumstances that defendant had not established consent to the alleged search, and that consent was not the defense, it was not error for the court to fail to instruct on consent.

Defendant maintained pretrial and throughout the trial that he was innocent of any wrongdoing, i.e., that his investigation of the complainant and her boyfriend was, in all respects, routine, and that he performed only one permissible, limited search for weapons. Defense counsel's pursuit of the defense that the second search never occurred and defendant committed no wrongdoing, as opposed to a defense of consent, was a matter of trial strategy that defendant has not shown was not sound and that this Court should be reluctant to second-guess. See *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *People v Strong*, 143 Mich App 442, 449; 372 NW2d 335 (1985). That defense counsel's strategy failed does not in itself render his assistance ineffective. *Strong, supra*. Defense counsel's failure to request jury instructions on the parameters of a legal search or consent does not, under these circumstances, constitute ineffective assistance of counsel where consent was not pursued as a defense and defendant denied that any impermissible search occurred. We conclude that defendant has not shown ineffective assistance of counsel and the trial court did not abuse its discretion in denying defendant's motion for new trial in this regard.

Defendant also maintains that trial counsel should have objected to all the objectionable testimony, to the prosecutor's conduct and argument, and should have requested that the jury be instructed on the principles of the officer's right to detain and search, including his right to request a consent to search, and be correctly instructed on the use of similar-acts evidence. Defendant argues that none of counsel's errors could conceivably be considered reasonable trial strategy.

Defense counsel's strategy was to pursue a theory of defense that, if believed, would have resulted in defendant's acquittal on all three CSC counts. This was not below an objective standard of reasonableness. To the extent counsel failed to make valid objections, we conclude that the outcome would not have been affected had the objections been made.

VIII

We also reject defendant's argument that the cumulative errors clearly affected defendant's substantial rights and the fairness and integrity of the proceedings. The cumulative effect of individually harmless errors can warrant reversal if the effect was so seriously prejudicial as to merit a finding that the defendant was denied a fair trial. *People v Knapp*, 244 Mich App 361, 388; 624 NW2d 227 (2001). However, we find that very few of defendant's claims of error have merit, and the ones that have merit do not, separately or cumulatively, warrant reversal.

IX

Defendant next asserts that his convictions were based on insufficient evidence and were against the

great weight of the evidence. He reasons that, even if Sargent is believed, he engaged in a *consent* search that was not a strip search or a body cavity search, and he therefore cannot be convicted of CSC. Defendant argues "appellant can find no reported case where a police officer was convicted of a crime because the scope of a *consent search* allegedly exceeded proper bounds."

This Court reviews de novo a claim of insufficient evidence, and reviews for an abuse of discretion a trial court's ruling on a motion for new trial based on a great weight of the evidence claim. *People v Lueth,* 253 Mich App 670, 680; 660 NW2d 322 (2002). "When reviewing a challenge to the sufficiency of the evidence, appellate courts examine the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt." *People v Kelly,* 231 Mich App 627, 641; 588 NW2d 480 (1998).

Defendant's claim is founded on the inaccurate premise that the record unequivocally supports that Sargent consented to the second search. As discussed above, Sargent's testimony did not support that she consented to the search defendant actually executed, nor did defendant pursue consent as a defense below. We thus reject defendant's argument that because there was consent, there cannot be CSC, although the search may have exceeded proper bounds.[4]

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[4] The trial court found that there was sufficient evidence of force and coercion under the circumstances that defendant separated the complainant from her male companion and put her in the back

X

Finally defendant asserts, relying on *People v Khoury*, 437 Mich 954; 467 NW2d 810 (1991), that because he was required to carry a gun as a police officer, he cannot be convicted of CSC under the armed with a weapon theory.

The *Khoury* Court concluded, based on the Legislature's then-recent clarification of the meaning of MCL 750.227b, that the Legislature did not intend that on-duty police officers in the performance of their duties be subject to *felony-firearm* charges. However, *Khoury* is based on a statutory exemption contained in the felony-firearm statute, and there is no such exemption for on-duty police officers under the CSC statutes. Defendant argues that an on-duty "police officer, who is required to carry a weapon, should not face enhanced criminal penalties for carrying that weapon where it is mandatory and where the weapon is not in any way used in the offense." The Legislature is free to enact such a provision, as it did in the felony-firearm context, but it has not done so. Further, under the circumstance that the *Khoury* Court initially denied Khoury's application, and granted reconsideration only after the Legislature enacted the statutory exemption, it would be inappropriate for this Court to create a common-law exemption of the sort urged by defendant.

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seat of the patrol car, performed an improper search that violated departmental policy and was unreasonable under the Fourth Amendment and, at the time of the search had the power to determine whether charges would be brought against the complainant.

Affirmed.

/s/ Richard A. Bandstra
/s/ Helene N. White
/s/ Pat M. Donofrio

APPENDIX F

MICHIGAN SUPREME COURT
Lansing, Michigan

Maura D. Corrigan,
Chief Justice
Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
Justices

Order

Entered: August 31, 2004

SC: 125251
COA: 238005
Oakland CC: 2001-177388-FH

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

BRENT ALLEN SMITH,
Defendant-Appellant.

On order of the Court, the application for leave to appeal the October 7, 2003 judgment of the Court of

Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

d0824

[SEAL] I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

August 31, 2004 /s/ Corbin R. Davis